Alberta's Constitutional Reform Task Force

Roundtable II
November 2, 1990

"Dynamics of Federalism"

CONSTITUTIONAL REFORM TASK FORCE OF ALBERTA

91-04014/

MEMBERS:

Hon. Jim Horsman, Chairman
MLA, Medicine Hat

Stan Schumacher, Vice-chairman
MLA, Drumheller

Jack Ady
MLA, Cardston

Hon. Dennis Anderson
MLA, Calgary Currie

Hon. Nancy Betkowski
MLA, Edmonton Glenora

Fred Bradley
MLA, Pincher Creek-Crowsnest

Pearl Calahasen
MLA, Lesser Slave Lake

Stockwell Day
MLA, Red Deer North

Hon. Ken Rostad
MLA, Camrose

Gary Severtson
MLA, Innisfail

STEP ONE - ROUNDTABLE MEETINGS

The Government of Alberta established a Constitutional Reform Task Force to examine the province's future in Confederation. As a first step in the process, the Task Force is holding roundtable discussions with constitutional experts on the changing nature of federalism.

As a second step, a discussion paper based on the roundtable meetings will be issued to Albertans. Thirdly, full public hearings will be held throughout Alberta in order to develop an Alberta position on constitutional reform.

Finally, recommendations will be submitted to the Legislature for full public debate by all parties.

The following is a transcript of the second roundtable session, held November 2, 1990.

For further information, contact:: Communications
Alberta Federal and Intergovernmental Affairs
(403) 422-1510 Fax: (403) 423-6654

November, 1990

ALBERTA'S CONSTITUTIONAL REFORM TASK FORCE

ROUNDTABLE II

Calgary, Alberta

November 2, 1990

MR. HORSMAN: Good morning, ladies and gentlemen. Can everyone hear? I would like to call the meeting to order.

First of all, I'm Jim Horsman. I'm the Minister of Federal and Intergovernmental Affairs and the Chairman of the Alberta Constitutional Reform Task Force. I'm going to introduce the members of the Task Force to you and give you a brief outline as to the purpose of our discussions. Seated to my left is Stan Schumacher, the MLA for Drumheller, who is the vice-chairman of the Committee. At the end of the table is Stockwell Day, the MLA for Red Deer North. To my immediate right is Ken Rostad, the MLA for Camrose, Attorney General. At the end of the table, Pearl Calahasen who is the MLA for Lesser Slave Lake. Next to Pearl is Jack Ady, the MLA for Cardston, and then Gary Severtson who is the MLA for Innisfail.

Other members of our Task Force who are unable to join us today are Nancy Betkowski, the MLA for Edmonton Glenora, the Minister of Health; Dennis Anderson, MLA for Calgary Currie, Minister of Consumer and Corporate Affairs who has lost his voice as a result of serious laryngitis -- which is a terrible thing to happen to a politician -- and he is unable to join us and he sends his regrets; Fred Bradley who is the MLA for Pincher Creek - Crowsnest. So those members of our Task Force will be joining us at other roundtables.

I'm just going to make a few opening comments. This is the second of four roundtables which are proposed to discuss Alberta's role in the future of Canada, and this morning we are going to undertake a review of three particular issues: The subject of aboriginal rights, the subject of the Charter of Rights and Freedoms within the Canadian Constitution, and the subject of institutional reform.

The next meeting will be held here again in Calgary three weeks from today on the 23rd of November. At that time we will be discussing the topic of restructuring federalism. At that time we will have with us the following participants: Fernand Landry, the former Deputy Minister to the Premier of New Brunswick, of course, from New Brunswick; David Bercuson, a professor of history, University of Calgary; and Ted Byfield, the editor and publisher of the Western Report, British Columbia Report, known to most western Canadians. Both of those two latter gentlemen will give us perspectives on the western situation, and Mr. Landry will, of course, comment on some of the developments that are being considered in Atlantic Canada.

The fourth and final meeting has not yet been finalized in terms of date, but it will take place in Edmonton probably on November 28th or 30th, and the availability of speakers to discuss the amending process of the Constitution and the economics of federalism will be part of that final roundtable.

I want to assure everyone here and those who will be watching this on cable television -- I should point out that these programs will be broadcast in tape form throughout the cable systems in Alberta over the next few weeks -- that this process of roundtable discussions is really only the first step in the Alberta Government's approach to defining Alberta's role in confederation.

After we've concluded our final meeting, we will move to prepare a discussion paper for the people of Alberta to consider. That discussion paper, we expect, will pose certain questions for Albertans' considerations as to where we should be as a province within confederation and the nature of confederation itself.

I dare say that the following discussions we will have, we will be posing very fundamental questions and we will be asking Albertans their views. I believe the questions will range from everything relative to the very fundamental nature of the British Parliamentary system. Will it continue to serve Canada in the 21st Century? Is the Constitutional Monarchy the appropriate method by which we find ourselves governed? What will the nature of the provinces be? What's the future of the Territories? What will be the appropriate division of responsibilities between various orders of government? In 1867, there was a division of responsibilities. Is that

appropriate for the 21st Century?

We will be discussing, as well, other fundamental questions such as the language policy, the multicultural policies. I'm not prejudging, and neither are the members of our Task Force, any items because we have to give this the most comprehensive review of the constitutional position ever taken in Alberta.

Now, once that discussion paper has been prepared for consideration by Albertans, I hope and our Task Force hopes to have devised certain fundamental questions which we will try to have circulated as broadly as possible so that every Alberta household will be able to discuss and consider the discussion paper and then respond through a questionnaire to be returned to their members of the Legislature, so that we will have the broadest possible access to the views of Albertans.

And then there will be a series of public meetings throughout the province where there will be presentations to our Task Force by individuals or groups within our society, and we have not yet, of course, formulated a timetable for that process, but it will certainly be undertaken.

Once that has been completed, the Task Force will then prepare a position paper, and that will set forth the position of the Task Force and, obviously, the position of the government. That will be put forward to the Legislative Assembly for a full debate and discussion, and I would suggest that there's a very good possibility that we would engage the Public Affairs Committee of the Legislature in that discussion.

The Public Affairs Committee is a committee comprised of every member of the Legislative Assembly, and we would expect public hearings of that committee to take place as well before we finalize the position relative to Alberta's role in the future.

In addition, we've seen that other governments in Canada have started their consideration of the issues facing the country. Clearly, every proposal is different including the one which was announced yesterday by the Prime Minister relative to the Federal Government's efforts to assess the views of Canadians. Quebec has adopted a completely different model. New Brunswick has adopted a different model, but in the process of these discussions, we hope to have contact with each of these other bodies so that we can then proceed to move along at about the same pace, if you will, in terms of developing our position here within Alberta.

So with that in mind, today's discussions, I'd like to commence those but just point this out before we do. Those of you who wish to follow the process throughout, as I indicated earlier, the sessions are being videotaped and will be carried on cable throughout Alberta at a later date, and those will be advertised. Those of you who wish to be placed on a mailing list for receipt of information and material which will be produced by the Task Force in the course of our hearings, please give us your names and addresses so that we can keep you fully aware of the progress that we make because the key element in this whole exercise is to establish clearly in Albertans' minds that they have the full opportunity to provide information and advice to their government as to the nature of confederation.

Just another point that has been brought to my attention since our first discussions. People have asked me, "Well, are people that interested in discussing the Constitution anymore? Aren't they more interested in discussing the subject of the economy and where the economy is going?" And I really believe that we have to keep in mind is this. That what happens with our economy depends to a large extent on how the constitutional framework of the country is established, and I believe that the two, the economy and the Constitution, are inextricably interwoven. So what happens with regard to the Constitution and the division of responsibilities between government is fundamental to the future of the operation of our economy. So we're going to discuss those two issues in the course of our discussions.

Our first presentation this morning, then, if I could move to that, will be on the subject of aboriginal issues, and our presenter this morning is replacing Chief Strator Crowfoot, who is unavailable, but in his place the Siksika Nation of the Blackfoot Confederation has made available their constitutional advisor Mr. Andrew Bear Robe.

Andrew has been responsible, I understand, for handling the Siksika Nation's self-government initiatives in land claims' negotiations. He has a Bachelor of Arts and Master of Arts Degrees in Political Science from the University of Calgary, and his Masters Thesis was entitled "Aboriginal Self-government in Canada".

I'd like to welcome you this morning, Andrew, and ask for your comments, following which we will engage in some dialogue with you and members of the panel.

Thank you for coming.

MR. BEAR ROBE: Thank you, Mr. Horsman. Honourable Members of the Task Force, Ladies and Gentlemen. It gives me a great pleasure to be here this morning representing the Siksika Nation and also representing Chief Strator Crowfoot who is unable to be here with you this morning due to other commitments. But let me assure you at the outset that the Siksika Nation takes this Task Force very seriously, and we want to be fully involved in any constitutional discussions relating to our interests especially regarding the Treaty and aboriginal rights, and to that extent, we will be fully prepared to cooperate in any way we can in order to facilitate the constitutional roundtable discussions.

I understand there is 15 minutes to make our presentation allowing for a question and answer period after that time. So I will make my presentation within the allotted time. I'm not sure if I will be able to go through everything I wanted to say this morning simply because Treaty and aboriginal rights are very complex topics. They are embedded in the historical relationship between the British Crown, later the Canadian Crown, and the Indian Nations of Canada back to the earliest times of when European Nations started to claim this Country of North America.

We, of course, have been here from time immemorial, and therein lies the concepts of aboriginal rights, Indian title, Indian sovereignty, the right to self-determination. And let me state at the outset that the Indian Nations across Canada are truly nations in every sense of that term similar to the way you might refer to the German Nation or the English Nation and any other nation upon the face of this earth complete with their own language, their institutions of government, their institutions of structures which keep their society in place, and everything else that might determine the essential qualities of a people who comprise a nation. And we maintain today that we do have those qualities still.

Regarding aboriginal Treaty rights, the starting point of any discussion regarding Indian rights in Canada today must begin with the Royal Proclamation of 1763. This Royal Prerogative Order came directly from King George III, King of England, and of the British Imperial Empire which included British North America. In that royal decree, King George III, the highest source of British law and policy, not only implicitly recognized the Indian title to all of North America, but he also recognized Indian Nations' right to political self-determination.

The Proclamation states in part: "The several Nations or Tribes of Indians with whom we are connected and who live under our protection should not be molested or disturbed in the possession of such parts of our dominions and territories as not having been acceded to or purchased by us. I reserve to them or any of them as their hunting grounds."

The Proclamation has been referred to by the Supreme Court of Canada as an executive order having a force and effect of an act of parliament. It has never been repealed by any Canadian or British Parliament, and, today, it forms part of the Canadian Constitution of 1982.

The Royal Proclamation of 1763 did not create Indian land rights in North America, however, it did recognize and affirm the existence of those collective rights prior to European contact. In the case of the Western Provinces, those same preexisting Indian land rights were clearly recognized again, reaffirmed and protected once more in the Ruperts Land and Northwest Territory Order of 1870 pursuant to Term 14 of that agreement.

Therefore, when considered together the Royal Proclamation, the Ruperts Land Order of 1870, and Treaty 7 of 1877, obligate the Canadian Government, the Provincial Governments, and the Canadian people as a whole to acknowledge and show due respect to our right to obtain a fair and equitable compensation for our lands and natural resources thereupon. Secondly, our preexisting right to live under our own tribal laws and to govern ourselves within the broadest limits of the Canadian Constitution, similar to any other provincial or territorial government. Therefore, when we speak about aboriginal rights today, we are referring to those collective rights which we all possess as members of Indian Nations.

Our Indian Governments, whether they be elected or operating under tribal custom, can exercise jurisdiction over matters such as land, water, hunting, fishing, natural resources, and certainly, the sovereign right to govern ourselves.

The sovereign right that I'm referring to and speaking of today can best be understood when we consider the numerous treaties that were entered into both pre- and post-confederation between the British, French, and Canadian Crowns, and the Indian Nations, had clearly connoted political sovereignty and independence on either side of the bargaining table. At those times, political understandings, legal undertakings, and forcible promises, and protocol were exchanged. The full force and effect

of those sovereign undertakings continue to this day and are referred to as aboriginal and Treaty rights by contemporary legal scholars, academics, and politicians. In addition, those rights have now achieved constitutional standing in the Constitution Act of 1982; namely, Sections 25 and 35.

Our sovereignty as Indian Nations is not a myth. It is as real in fact and in law similar to British or Canadian Sovereignty. Over 400 treaties were entered into by the American Indian Nations and the U.S. Government. In Canada, between 1680 and 1929, Indian First Nations signed six to seven formal treaties with the Imperial Canadian Crown for various purposes such as military alliances, peaceful relations, and land secessions. The Eastern Indian First Nations, such as the Iroquois Confederacy and the Chippewas, received 26 Royal Patents from the British Imperial Crown as a result of their military alliance with Britain against France during the Seven Years War of 1756 'til 1763.

Regarding the Indian land secession and peace treaties in Canada, their main purposes were to recognize the Indian title. Secondly, allow peaceful and orderly European settlement upon Indian territories, and thirdly, implicitly recognize the continuation of aboriginal rights. Treaty 7, which is part of this territory of Southern Alberta, facilitated the peaceful European settlement upon Siksika and confederacy territory in exchange for our perpetual Treaty and aboriginal rights. The alternative was to go to war with the white man over our lands as some Indian Nations did in the United States.

However, historic chiefs such as Crowfoot, Red Crow, Bulls Son, Bulls Head, Eagle Tail, Rainy Chief, counseled our war chiefs against taking such drastic action. In addition, the Blackfoot Confederacy Nations, which is composed of the Blackfoot, Black Peigan, Sarcee, chose not to join the Riel rebellion of 1885. If we had, the outcome of that so-called Northwest Rebellion could have taken a very different turn from what the history books have recorded. Within that context therefore, Louis Riel failed to instigate a real Northwest Rebellion.

Recently, there have been a string of Supreme Court of Canada decisions which should help strengthen the legal and moral position of our Treaty and aboriginal rights. The most recent one is the Sparrow Case, 1990. That case is the first high court decision that actually dealt with Section 35.1 of the Constitution Act of 1982. It unanimously

decided that Section 35 has changed the way the courts should deal with aboriginal law in Canada. That is, the Federal Government cannot pass any law infringing upon Treaty and aboriginal rights which breaches its fiduciary obligations to Indian people.

Any contemporary interpretation of Section 35 rights must take into consideration the historic relationship that existed and still exists between Indian Nations and the Crown. If the Crown intends to extinguish any Treaty or aboriginal right, it must do so in clear and plain language. While the Federal Government can regulate Section 35 rights for conservation purposes only, it cannot do so to the extent that it would make those rights meaningless.

In the Sparrow case, the Court held that the aboriginal right to fish takes precedence over other group interests such as fishing clubs for the affluent members of white society.

The Sioux Case of 1990 decided that preconfederation Treaties made with Indian Nations, such as the 1760 Huron Treaty, remain in full force and effect until the Indians themselves decide and consent to terminate the Treaty relations. Therefore, pre-confederation treaties remain good law today even though the Federal and Provincial Governments may act in a manner contrary to the Treaties.

In the unanimous decision of the Supreme Court, mention was made of the Simon case of 1985, wherein it was said that treaties and statutes relating to Indians must be deliberately construed and uncertainties resolved in favour of the Indians.

The Ganon, 1984, case decided that the Federal Government has the obligation to act in a fiduciary manner when dealing with aboriginal peoples' interest in lands and that that relationship between the Federal Government and the Indian people is trust-like. Quite importantly, Ganon decided clearly that the Federal Government is accountable to Indian people for the care and management of the Indian interest in lands including reserve lands which the Indians own.

Therefore, the Ganon and Sparrow cases gave a distinct legal meaning to Canada's special relationship with Indian Nations. This means that the existence of the Indian title has an independent legal interest in land when coupled with the Crown's undertaking in the Royal Proclamation of 1763, and in subsequent treaties, acts, and agreements of the

responsibility to protect Indian interest from exploitation and fraud, gives rise to the fiduciary relationship in relation to Indian land dealings.

Any discussion today regarding land claims in Canada must begin with the proprietary concept of Indian title, which essentially means a full and complete aboriginal ownership, occupation, and dominion over the North American continent. Aboriginal title essentially means the same as Indian title. Both may speak of an independent legal interest in land which must be satisfied by the Crown before it can claim unfettered title to any piece of land in North America. Under the Canadian Constitution of 1982, aboriginal title can be asserted, not only by Indians, but the Inuit and Metis as well.

In any case, the Indian title was already recognized and protected both by the British Imperial and Canadian Crown through such executive acts as the Royal Proclamation of 1763, the Ruperts Land and Northwest Territory Order of 1870, pre- and post-confederation land secession treaties, the natural resources transfer agreements of the 1930s respecting the prairie provinces, and the more recent comprehensive land claims settlement for the northern regions of Canada. All of the foregoing executive undertakings must be read together in order to arrive at the common law and statutory pronouncements regarding Indian title and the associated rights arising therefrom.

Contemporaneously speaking, there will never be lasting peace and friendship in North America until a basic conflict between the white economic- and political-elite's excessive materialism, insatiable financial greed and rapid and environmental desecration come to terms with the Indians' ancient spiritual attachment to the land and nature. This fundamental conflict between white and Indian values, which at times seems irreconcilable, remains at the root of the problem. It largely explains the dominant society's extreme reluctance to fully embrace the notion that North America does in fact and in law belong to its original possessors and settlers.

The national and judicial will of contemporary Canada readily accepts the notion that Indian First Nations have occupancy and usufructuary rights. However, that kind of legal characterization of the Indian title falls short of the mark and is demeaning, racist, and unworkable simply because those concepts connote something, something less than a freehold estate under the English law of property.

As a direct result of the dangerous and volatile situation created at Oka, Quebec this past summer between the Mohawks and the citizens of Quebec, everyone in Canada that has expressed an opinion on the subject agrees that the Federal Land Claims Policy must be substantially revamped. That policy must show fresh approaches, new attitudes, and more flexible logic if Canadians are to enjoy calmer and lasting relationships with aboriginal peoples.

I think I'll stop there, Mr. Chairman, and I could answer any other questions that might come from the floor.

MR. HORSMAN: Thank you very much, Andrew, for your outline of the history of the relationship between the native peoples of Canada.

I'll just start this off, if I could, because I think perhaps this should be addressed to get your views on this. The Constitution of Canada provides in Section 91.24 that Indians and Indian lands are the responsibility of the Federal Order of Government, and then in the case of Alberta, the Natural Resources Transfer Act of 1930 provided that with regard to settling land claims, which is determined by the Federal Government, that the Province of Alberta would make available public lands to satisfy those validated land claims, so there is a role for both the Federal Government and the Province to play in terms of land claim settlements.

One of the things that's been evolving in the past few years is the necessity of, in my view, dialogue and agreement between Treaty Indian peoples, the Federal Government and the Provinces. And yet there has been a reluctance on the part of some Indian leaders to engage in discussions with the provinces on the premise that they only deal with the Federal Government pursuant to Section 91.24.

I'd just like to get your views on whether or not that is going to be maintainable, if you will, over the next period of time as we move to discussing social programs and other policies of governments of the provinces which impact upon Indian peoples.

MR. BEAR ROBE: Thank you, Mr. Horsman.

Regarding the Section 91.24 constitutional head of power, it is an exclusive Federal power, and it gives authority to the Federal Government, exclusively speaking, in our Constitution to deal directly with

Indians and Indian lands. There's no mention of provincial involvement under the Canadian Constitution for the Provincial Governments, and historically speaking, that was done for a very specific purpose and reason.

Similar to the Royal Proclamation of 1763, the Federal Crown reserved unto itself the sole authority to deal with Indian Nations and therefore excluded the local governments of those days from dealing directly with Indian Nations. At that time, it was the Imperial Government that had the authority to purchase Indian lands and enter into Treaties with Indian Nations for the relinquishment of the aboriginal title to their lands.

And the local governments of the day were not permitted to deal with the Indian Nations because of certain frauds and misunderstandings that had developed between the original 13 colonies and the Eastern Indian Nations at that time. Of course, in Western Canada, during the 1700s, we had very few white people coming out this way, so we didn't have to worry about it back in those days.

But back in those days, the Proclamation of 1763, that concept evolved into the Section 91.24 head of power where the Federal Government reserved unto itself the sole authority to deal with Indian first nations. And the Provincial Governments, being considered as local governments, were excluded from dealing directly with the Indians and Indian lands. And, of course, under The Indian Act which controls every facet of our existence from birth until death, even past beyond death to the control of our estates, the Federal Government reserved unto itself its exclusive power to deal with us in the way it likes to under The Indian Act, but in its wisdom it inserted Section 88.

It states that subject to the terms of any Treaty and any other act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and with respect to Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation, or bylaw made thereunder and except to the extent that such laws make provision for any matter for which provision is made by or under the Act.

So therefore, Section 88 provides a provision under Federal Law for the province to come in, and this has raised a lot of interesting problems, I should say, and also some ingenuity between our tribal

administrations, our tribal governments, and the Provincial Government where we have entered into tripartite agreements between the Federal, Provincial Government, and Indian First Nations. For instance, the Siksika Nation was the first Tribe in Canada to enter into a tripartite agreement with the Federal Government, the Province of Alberta, and ourselves to administer and run our Child Welfare program. So we were quite proud of that, and it worked very well. It was done under the former Alberta Minister of Social Services Neil Webber.

Now, regarding the constitutional appropriateness of that arrangement, it's sort of like we are married to the Federal Government, but we carry another relationship with the Provincial Government without saying too much about it. It has evolved that way, and I would predict it will continue to evolve that way until, for instance, the work of this task force comes up with its report and recommendations. There would have to be, somewhere along the line, one of these. In the near future we will have to address that issue. Where does the Provincial Government, where does the Province of Alberta fit into the constitutional makeup and the Indian First Nations in Alberta? Because we are pursuing our self-determination arrangements within the Canadian Constitution of Canada, similar to the aspirations no less significant and no less intense than in Quebec, is assuming to rearrange its constitutional position within Canada. Quebec is attempting to make its constitutional powers stronger whereas we're trying to get in, into the constitutional makeup of Canada. We want to complete that Treaty process that was started back in the 1800s because we believe that the spirit and intent of the treaties provided for political self-determination.

And in the United States, the American tribes, their domestic sovereignty is recognized, and the U.S. Government operates without any serious impediment to its own sovereignty, so I don't see any reason why in Canada and within this province we should be so afraid to deal with the concept of Indian sovereignty. To my way of thinking, Indian sovereignty's bottom line position is shared sovereignty with the provinces and with the Canadian Government.

So therefore, Section 91.24 and the place for the provincial jurisdiction in our arrangements is open for discussion. And I'm sure with players like we have on this table, we will sit down like reasonable men and not put up any entrenched positions before we start discussing. And

we have to realize that we have to make compromises along the way, and we have to approach those discussions and the work of this Task Force within that spirit.

I hope I answered your question.

MR. HORSMAN: Thank you very much. Ken Rostad and Pearl.

MR. ROSTAD: Thank you, Chairman.

Andrew, I think the context of the Indian people being brought into or related to within the constitutional context, the Federal Government has looked at it as trying to fit into the present Federal/Provincial relationship, and I think you touched on that.

When you discuss being the sovereign nation and sharing sovereignty, could you perhaps go in a little bit more of that and in the context of how you would define self-government or self-determination, and I see the use of both phrases.

MR. BEAR ROBE: Well, Mr. Rostad, when Indian leaders and Indian academics such as myself, talk about Indian sovereignty or self-determination of Indian Government, they all essentially are pointing towards the same direction.

And that is the recognition by the Canadian Government and by Provincial Governments that we do have certain inherent powers that were never extinguished by any Treaty or executive undertaking by the Imperial Government and by the Canadian Government. That those residual powers must be resurrected today under the concept of Indian self-determination. Call it Indian self-government. But we see it as re-establishing ourselves as we once were as self-governing political entities.

And that concept was clearly expressed by Chief Justice John Marshall of the United States Supreme Court in a decision of the case of the Georgia versus the Cherokee Nation of 1832. We want to reestablish that relationship.

It is the Indian leaders' position that the treaties really connoted continuation of certain forms of political self-determination within the Canadian Constitution as we understand it today; and therefore, Section 35 of the Charter, the Canadian Constitution, inherently

constitutionalizes those rights, inherent powers, for political self-determination.

And concepts of Indian sovereignty, and I'll stress again we do not mean complete independence from Canada. What we merely want to do is to reestablish ourselves to the time when we sat down as equal partners under the same bargaining table to give away, to relinquish, our Indian title to our ancestral lands through 11 treaties in Canada, Treaties 1 through 11. And Indian First Nations do not believe that when they entered into those treaties that they gave up everything, that they gave up their right to self-determination within their own country.

And there are good historical legal arguments behind that ascertation by the Indian First Nations, and it is a right which is supported, not only by history, but also by both Canadian and American jurisprudence and I would add by international law as well because that was dealt with during the 1500s by eminent Spanish theologians and jurists such as Francisco de Victoria, Bartolome de Las Casas. This concept of Indian title, Indian land rights, Indian self-determination are not new topics. They were being discussed during the 1500s by the Spanish.

MR. ROSTAD: Could it be in the context of the aboriginal discussions that went on, constitutional discussions -- in fact, our chairman was active in 18 to 20 of them, I believe, at various times -- Alberta's position has been and probably not unlike the Sparrow case that says, if you had rights, they weren't given up other than specifically as spelled out in the treaties, but the problem comes that you have to define what rights you may have had that weren't taken away, and until those are defined, then we can't really determine what self-government or self-determination is.

That's certainly been the position that Alberta put on the table during the constitutional talks, that there was no problem discussing, and, in fact, there's no problem with effecting a self-government or self-determination if we could get down to defining exactly what it is.

MR. BEAR ROBE: That is something that the Treaty 7 Tribes are currently studying. Under the auspices of the Tribal Chief Association of Treaty Number 7, we have undertaken a study for the interpretation of the spirit and intent of Treaty Number 7 of 1877, and we hope to complete the study over the next 12 months.

And the results of this study will be made available to the Federal Government and I'm sure to the Provincial Government, the Province of Alberta, as well. So we ourselves want to fully define in a clear way what we mean by Indian self-determination, Indian sovereignty, Treaty rights. What do they mean today? I would say what they mean today, but they would be the opinions of me personally, but I'd rather have those presented in an official way by a recognized chief's organization, and I'm sure that the results of your Task Force, together with our study of the Treaty interpretation will form some basic documents in dealing with the Constitution.

MR. HORSMAN: If I could just jump in here, I think that's extremely important to point out, that you are in the process of trying to define these issues as well. That's what we're really discussing. We're running a little bit short of time. I have two additional members of the Task Force that would like to ask questions. Pearl Calahasen and then Stockwell Day.

MS. CALAHASEN: As a matter of fact, I think Ken Rostad has asked some of the questions that I wanted to ask you, Andrew, and that's relative to the sovereign nations. As you probably realize, some of the native groups and the Treaty Indian groups have stated that there's quite a difference between the sovereign nation as well as the self-determination aspect, and I just wanted a view, but I think you've covered that particular one.

Now, when you were talking particularly in the beginning of your speech, you brought out the fact that the aboriginal view to the right to self-determination was the nations to be recognized as nations such as the German or the English, and one of the questions that I keep asking some of my groups is that there are so many Bands, and in my own constituency, I've got, I think, seven Bands. Do we recognize the Bands as separate Nations, or do we recognize the Treaties under 6, 7, 8 as the Nation, or what kind of view is that? I know there was some determination in terms of you saying that you're looking at that particular question.

However, I think that leads a lot into some of the other questions that I have, and that's looking at the real differences under the socioeconomic factors, and one I'll take, and this is information that I think was provided to us, is the size. How do the smaller reserves, if they're going

to be recognized as an individual nation, to do all the governments in the structure that you brought out initially when there's such limited dollars for them to be able to use. And, you know, we've got Indian reserves that are under 500 population, and that's pretty tough when you're looking at trying to bring out all those particular kind of things that have to be done under a nation. How would this be done, or is it going to be accumulated under those particular treaties as I said.

The other one is the role of the traditional authority. How do we deal with that particular one, and what law is primary then? Is it the Indian or is it the non-Indian law that would be primary in Canada, or do we look at it as individual, a country within a country?

The other one is how can traditional power, whether it's through elections or authority or hereditary chiefs be represented in the modern day organization?

MR. HORSMAN: Well, Pearl, you've certainly asked searching questions, and I'm not so sure that we can answer them briefly, but I think perhaps Andrew might want to consider those so that in the course of our roundtable discussions at the end of the three presentations, he might want to come back and try and deal with those and perhaps get some additional views, so I think if we could pose the questions now, let you think about them, perhaps we can get back to them because certainly they're fundamental to the whole issue.

Stock, do you want to put a question on the table that hasn't been asked so far?

MR. DAY: I'd like to do that, Mr. Chairman, thanks.

Andrew, your comments have been helpful to me in some areas, and I'll admit, because these issues are so complex, still struggling in others.

The 1763 Royal Proclamation, which you've referred to, does talk about nations being dealt with as nations, and that's a real precedent that was set there and stated, but there's a tension in that document because it also talks about the fact that these nations, as King George said, are to be under our sovereignty, protection, and dominion, and that to me reflects a bit of a schizophrenic statement. I don't know if the king just got out of the

wrong side of the bed that morning or what happened.

But in that context, have we moved, do you think, away from the statement that the nations of which you speak are under the sovereignty, protection, and dominion at that time of British Rule and then moving into Canadian Rule, I guess the question is, on the shared sovereignty issue. Are you acknowledging any right of sovereignty or dominion by the Canadian Government as reflected in that 1763 statement, and then I think that tension was reflected in other acts that followed. So that would be one question, to what degree are you recognizing shared sovereignty?

And the other question for consideration at a later discussion, in reference to Treaties 1 to 11, I think you made a comment, Andrew, the rights to all lands. Is that a reference to rights of all land in North America or only those as defined in those treaties? Those would frame of questions for later discussion.

MR. HORSMAN: Well, those are excellent questions. I don't want to curtail the discussion, but I think in having posed this in this way the morning with the members of the audience and all the members of the Task Force, it's identified the complexity of the issues facing us and the other provinces and the Federal Government in terms of redefining and restructuring Canadian Federalism, and this is clearly an issue which must be dealt with and dealt with clearly and effectively, so I hope that we can come back to those points later on.

But I would like to move on to our next presenter who is Anne McLellan, Professor of Law at the University of Alberta. She was born in Nova Scotia and got her early legal education at Dalhousie, a well known and respected Canadian Faculty of Law and received her Masters at the University of London, King's College. She's been with us in Alberta now for a number of years, for the last ten years, as an Associate Professor of Law first at the University of Alberta and now as a Professor of Law.

She will be giving some introduction to some of the complexities that have been introduced into the constitutional framework of Canada as a result of the adoption of the Charter of Rights and Freedoms, and I'd like to ask Anne now to make her presentation, and then we will follow up with a short question period.

And once again I point out that in the roundtable

which will follow the three presenters, we will be able to come back to a number of issues that have been raised, and for members of the audience that wish to ask questions, I'd ask them to please be preparing them on -- hopefully, you've each been given some cards on which to write out your questions, and we'll collect those and try and answer as many of them as possible this morning. Those we can't answer, if you give us your names and addresses, we will try and answer by way of written replies.

Anne, would you go ahead, please.

Thank you for coming.

MS. McLELLAN: Thank you, very much, Mr. Minister.

It is my pleasure to be here today to speak to the Task Force of the Alberta Government in relation to constitutional reform, and for me this is a very important endeavor and one that is to be taken very seriously and hence it is with great pleasure that I am here today to talk to you a little bit about the Charter.

Just as you've discovered with the issue of aboriginal rights, the Charter of Rights and Freedoms is a multifaceted issue of great complexity, subtlety, and nuance, and therefore please forgive me if my comments today have a rather broad brush, superficial, approach to them, and maybe we can pick on some of the more subtle points in the roundtable discussion.

Having said that by way of disclaimer, my task is to talk about the Charter of Rights and Freedoms, which I think most people would agree is undoubtedly the most significant constitutional change in our country's history since 1867 and the founding of the country itself. It has also been the most controversial, with its strong proponents and its strong detractors. You have before you today one of the Charter's strong advocates. I might as well put that on the table up front.

The Charter of Rights was put in place to help define the relationship between the individual and the state and obviously to place limitations upon that which the state can do in relation to its treatment of individuals and groups. Leading up to April 1982, we had no constitutional protection against government abuse and excess, nor did we, putting a more positive cast on what I have just said, have a constitutional statement of the fundamental values for which this nation stood and in which it believed.

The Charter has often been misdescribed as the brainchild of then Prime Minister Pierre Elliott Trudeau. He was merely one, and one might suggest almost a "Johnny-come-lately" in a long line of scholars, lawyers, politicians, and average Canadians who had since the end of the Second World War come to believe that as a maturing democratic nation it was time for Canada to put on the record, in the sense of on the constitutional record, the fundamental values in which we believed.

I think it's fair to say that the one part of the patriation package which has always attracted strong popular support was the Charter. Not surprisingly, the average Canadian saw much benefit in constitutionally defining his or her rights in relation to government. In telling government there were limitations on the laws or actions it might pass or take. Not surprisingly, a number of Provincial Governments were more wary of the possible effects of the Charter. The rhetoric of our British institutions, Parliamentary Sovereignty, and the notion that Canadians' rights were better protected by elected and accountable representatives were all invoked to argue against the Charter but ultimately to no avail.

Now, we have had the Charter in place for almost nine years, and it is possible to offer some assessments as to its effects on the Canadian political, legal, and social scene. I'm going to list a number of factors which I think are important and overarching factors in relation to what has happened over the past nine years.

The first is that I believe in English Canada the Charter appears to be an immensely popular document. One Quebec sociologist has suggested that the Charter has taken on an icon-like status in English Canada. The Charter, in a very short period of time, has penetrated the consciousness of English Canadians like no other single event.

As the reaction to Meech Lake has indicated, the price to be paid for tampering with the Charter may be a high one. The movement to defeat Meech gained invaluable support for those who believed that Meech might dilute their hard-won Charter gains in 1982. Women are only the most notable of those groups. Further, to accommodate the fears of some, including aboriginal Canadians and the multicultural community, the Accord was ammended to ensure that nothing therein detracted from those particular groups' guarantees.

As Professor Allan Cairns has stated, the Charter

process in 1982 created stakeholders. By this I mean groups who had argued for their claims to be recognized and protected within the Canadian polity. Once having achieved constitutional recognition and protection, they will not easily give it up.

The Charter is probably, also in this area, an instrument of unity in English Canada. It is an instrument of empowerment for minority groups and women, and in relation to this unifying theme of the Charter, I think that even though it created stakeholders; for example, women arguing for their protection, the disabled for theirs, aboriginal peoples for theirs, ultimately, all of these groups are able to come together and say, I will protect your right, aboriginal peoples, the disabled, women, in the sense that I recognize by protecting your rights I am also protecting mine.

And, hence, I think that although there are discrete stakeholders who may not always agree in terms of the definition of individual rights, that ultimately, people come together, those who believe in the Charter and have seen their rights vindicated in some sense in the Charter, as a unity to protect the integrity of the Charter, and that, I believe, is what happened in part in relation to Meech Lake. A number of groups were concerned that the integrity of the Charter was being undermined and, hence, opposition became acute to that particular document.

Also, I would say this in relation to the notion of the Charter as a unifying theme. Many groups who felt left out, and perhaps in reality were left out in terms of any real access to the more traditional political processes by which social change took place, felt that the Charter gave them a means to participate in that process. And as I suggest they will not willingly give up that participation.

However, if we look to French Canada, I think we see a very different reaction to the Charter. The Charter is, indeed, viewed as an impediment to the achievement of the collective goals of Francophone Quebecers, and, indeed, they would suggest it has so proven. And I give you only two examples: The invocation of Section 23 by the Anglophone parents of Quebec in the Quebec Protestant School Board Case in which the Quebec Government was told that they could not, in the way they had chosen, limit English education. And perhaps the most notable and controversial example, the use of Section 2(b) by the Supreme Court of Canada the freedom of expression guarantee to strike down the French-only laws in Quebec for

French-only sign language laws in Quebec. As I suggest, Quebecers see the use of the Charter in this way as denying their ability to achieve their collective political objectives as a threatened group within the Canadian polity.

Therefore, I think there is a deep cleavage between the way English Canadians and Francophone Canadians view the Charter, and hence, I believe that in any next constitutional round in which Quebec is talking about staying in Canada as presently defined, Quebec will ask, as a minimum, for the non-primacy of the Charter of Rights and Freedoms, thereby giving it the means to control its own future and control its own cultural and distinct identity.

I think, indeed, this will present major problems for English Canada, and I think that we saw when Premier Bourassa invoked the opting out provisions -- of which I will say more in a few minutes -- that that act more than any other triggered English Canadians', one might even say, outrage in relation to what appeared to be and probably was a denial of the rights of Anglophone Quebecers. And I think that that is another example of the view or the way in which English Canada has come to view the Charter of Rights and Freedoms.

My second point, then, moving on from that, as I say, I think English Canada and French Canada view the Charter and its utility very differently. I think that will be a problem in any future constitutional reform. My second point is that it is undeniable that the Charter has placed limitations upon the doctrine of Parliamentary Sovereignty. That is, indeed, I would suggest, the purpose of an entrenched Bill of Rights and therefore it would be surprising if it were otherwise. The main purpose of Bills of Rights is to protect minority interests against the possibility of abuse by the majority. Bills of Rights are indeed antimajoritarian in that very real sense and are, I suppose, counterintuitive to our basic democratic notion of majority rule.

However, in recognizing and defining our fundamental democratic values, it seems to me that our commitment to majoritarianism is only one of those values, and another is our desire to protect minorities from abuse by the majority. Our task is to create the appropriate balance between these two fundamental values. I believe that unbridled parliamentary sovereignty provides no constitutional protection or recognition for this other fundamental value which I have identified.

Of course, our Charter has Section 33, the opting-

out provision which ultimately reinstates the value of parliamentary sovereignty. The ultimate trump card in our constitutional system resides with duly elected legislative bodies. The clause, as I have already alluded to, has recently come under severe criticism due to its use in Quebec to override the decision in the Supreme Court in the French-only sign cases.

This act, as I've suggested, more than any other, is directly responsible for the defeat of the Meech Lake Accord. Indeed, this act, on the part of Premier Bourassa, has led both Prime Minister Mulroney and then Premier David Peterson to call for the repeal of Section 33. While I personally believe that Section 33 is anomalous in an entrenched Bill of Rights, rights are either entrenched -- by that I mean beyond simple legislative override -- or they're not, it is not likely that Section 33 will be repealed. Its inclusion was part of the fundamental compromise that led to the Charter being acceptable to a number of premiers, including then Premier Lougheed and indeed Quebec. And I think that when one considers the position of Quebec, if it is to tolerate the notion of a Charter at all, it must be a Charter that includes an opting-out provision such as Section 33, so that they are able to pursue their own collective interests as they may define them from time to time. As I've already said, I think English Canada will have a major problem with that, but so be it.

My third point in relation to the Charter, or I shouldn't say my third point in relation to the Charter, but I think an issue related to the notion of parliamentary supremacy is that it is unquestionable that the presence of the Charter has altered the policy formulation and legislative processes in the sense that government is aware now that its legislation might be challenged and, hence, greater care is exhibited to ensure that legislation comports with Charter guarantees.

Assistant Deputy Attorney General of Ontario, John Cavarzan, has suggested that the most significant impact of the Charter will not come from individuals and groups invoking the processes of the courts in Charter litigation, but from governments' awareness of the Charter and the desire to ensure that its legislation meets the Charter's standards.

The effect of the Charter in this regard, should be better legislation and more sensitive policy formulation. For example, there should be greater attention paid by government to the alternative means by which government can achieve its valid legislative objectives. If there are a

number of such means available to government, the Charter's existence should ensure that legislators consider the least intrusive means by which to achieve their valid legislative objectives. And by this, when I speak of the language of least intrusiveness, this is the language of the Supreme Court in asking government, when creating policy and legislation, to choose means to achieve their valid objectives that impact as little as possible upon the guaranteed rights in the Charter.

My third point is in relation to the role of the courts under the Charter. Just as some suggest that our elected bodies have lost power under the Charter, the suggestion is made that the Courts, and in particular, the Supreme Court of Canada, has gained power.

It is true that our courts have an expanded role in relation to judicial review. Not only can they review the validity of the law on the basis that it exceeds legislative powers of the province, for example, as guaranteed in Section 92, but they can also review legislation and government action on the basis of a much broader list of criteria found in the Charter, so this much must be admitted. There has been an expansion of their role, in relation to the grounds upon which they can judicially review government action.

However, it is also undeniable that this role was given to them knowingly and intentionally by the political actors involved in the process leading up to 1982. And, indeed, if you buy too heavily into some of the rhetoric involving the courts and the Supreme Court of Canada, it creates, in my mind, this notion of these nine men and women in Ottawa in their ermine gowns in dark of night running from Legislative Assembly to Legislative Assembly stealing powers away from duly elected representatives of the public. And, indeed, that is wrong. The Supreme Court did not go out and seek an increase in its powers of judicial review.

Indeed, I have talked to many judges who probably wish the Charter had not come into their worlds because it has added to the complexity and difficulty of their lives. However, I think it is important to underline that this is not a power grab on the part of the third branch of government, the courts. This power was given to them and I think received by them cautiously and in some cases almost unwillingly.

I think what may have surprised people is the apparent vigor with which the Supreme Court embraced its role as ultimate

umpire between the individual and the state. Keep in mind, they had played the role of umpire between the two levels of government for a significant period of time under the Constitution Act 1867, so the role of umpire is not new to them.

The only experience that people had with the Supreme Court of Canada and the Bill of Rights was the ill-fated experience under the 1960 Canadian Bill of Rights where the Court's slavish adherence to principles of parliamentary supremacy made the bill useless as a means by which individuals' rights could be protected against government abuse and excess. The Courts had been severely criticized by almost every element of Canadian society, including politicians themselves, for this approach.

Indeed, their attitude of deference in relation to the Canadian Bill of Rights was one of the reasons many called for an entrenched Bill of Rights in 1982. Hence, I think the Courts and, in particular, the Supreme Court of Canada, felt that they would not again be accused of, if you like, a general wimpish status towards the enforcement of a rights defining and protecting document such as their performance had been criticized in relation to the Diefenbaker Bill of Rights.

Okay. I see my time is almost gone. I have a couple of other points that I'm just going to very quickly allude to. One is the notion that the Charter will bring about that which Michael Mandel, one of the Charter's major detractors in Canadian legal jurisprudence, calls the "legalization of politics", and Michael speaks to the fact that he's afraid that that which could be better resolved through political dialogue and debate will be removed from that milieu and will be cast in legal terms before the courts.

There is no empirical evidence to date that this is indeed the case. I would suggest, indeed, that most public interest groups and individuals continue to lobby government and engage in dialogue at the political level to bring about social reform. Indeed the judicial process, as the Attorney General knows, is so lengthy and so costly that it would be foolhardy on the part of individuals to first look to the Charter for the vindication of rights as opposed to the normal political processes.

What the Charter has done, however, is add another arrow to these groups' and individuals' bows if you like. If they feel their legitimate claims are not being listened to, they can attempt to convince a Court that their constitutional rights are being violated. Indeed, I would

suggest the presence of the Charter has probably increased general awareness about issues of governments and rights and has had a salutary effect in increasing overall political awareness among the Canadian polity. Therefore, I would conclude that there is no evidence that the Charter and the use of legal means to vindicate rights has led to a diminishing of the more traditional political process by which social reform occurs.

And my final point is in relation to the overall approach of the Supreme Court to date regarding the interpretation of the Charter. First of all, I think it is so important to right the record in terms of misinformation, and I give you one example of what I describe as misinformation in a letter to the editor that appeared in The Journal yesterday. This person suggests, it seems like every time a government passes a law, somebody in this land of 26 million seems to get the law overturned because that person seems to think that a right has been violated. That is incredibly wrong.

Indeed, as Mr. Rostad knows as Attorney General of this province, there have been very few laws overturned by the Charter of Rights and Freedoms. When one considers the number of important legislative initiatives that Provincial Legislatures and the Federal Parliament undertake on a yearly basis, the number of laws that have actually been overturned by the Courts on the basis of the Charter number merely, I should think, in a few dozen, if that.

Therefore, I think it's important to not permit the impression to be created that the Courts are willy-nilly striking down vast quantities of legislation duly enacted by our elected representatives. That is simply not the case.

And, further, in relation to this, I would speak to the approach the Court has taken to its role. If anything, I believe the Supreme Court of Canada has been very deferential and conservative in the analytical framework it has developed to study and review allegations of rights abuses.

I think, indeed, if you look at the Courts' body of jurisprudence, they recognized better than anyone the new role in which they were cast and it's dangers. One sees a Supreme Court cautiously working toward an analytic framework within which to decide these difficult issues. They speak always in terms of not overstepping the proper purposes of the Charter. They speak always to the recognition of the appropriate role for the

Legislature in our system of government.

And indeed, while I'm not going to go into the details of the Section 1 analysis here, the Oakes Test -- we may talk about that during the question period -- I would say this to you. That when, as you are probably aware, Section 1 deals with the ability of a government to justify a limit upon an otherwise guaranteed right as being reasonable and as being demonstrably justified in a free and democratic society.

The Chief Justice has defined the context of our free and democratic society in which the Court will operate, and indeed, I think while not a complete statement as he recognizes, he is on track in relation to defining that which we believe are the fundamental values of this free and democratic society, and it is in that context in which rights must be defined and rights vindicated.

He speaks to the fact that the Court is guided by the values and principles essential to a free and democratic society, some of which are respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and a faith in the social and political institutions which enhance the participation of individuals and groups in society.

So it is within that context that our courts go about their job of determining whether government legislative action or other government action violates the fundamental values that are articulated in the Charter of Rights and Freedoms.

And just one final note. If you read the jurisprudence of the Supreme Court of Canada, they have been most concerned about process and procedure. Indeed, I believe there is only one case in which they have told a government anywhere that the legislative objective being pursued in the challenge legislation was not a sufficiently important one to justify overriding constitutional rights. By that, that is the, if you like, first element of the Oakes Test. And what one does, once one has determined that there is a valid or sufficiently important government purposes reflected in the legislation, is then go on to apply a number of other tests, including whether or not the Legislature has chosen the least intrusive means by which to achieve that legitimate government objective.

But I think the message is clear that our courts are not in the business of commenting directly upon the wisdom of policy choices

made by duly elected legislative bodies. What they do, however, speak to is the means by which these duly elected bodies choose to implement valid legislative initiatives, and here we are concentrating on process, and as Mr. Rostad knows as Attorney General, our courts have always dealt with process concerns. It is something with which they feel most at home and most comfortable, and hence it is not surprising that the bulk of the Supreme Court's concerns to date with laws and with legislative action has been in the area of the process or the means employed by government.

And I simply conclude with Morgentaler as an example, a highly controversial case in Canadian Charter Jurisprudence. But what did the Supreme Court do there ultimately? Did they tell the Federal Parliament that the Parliament of Canada could not enact a law on abortion? Absolutely not. They said, of course it is a legitimate objective of the Federal Parliament to protect fetal life, however the means which you have employed in this particular section of the Criminal Code are deficient because they create the illusion of a criminal defence where none existed for vast numbers of Canadian women.

They speak to process, to procedure, so in the judgment they direct the legislation -- I suppose "direct" is too strong a word, it is my word. What the Court did was say it is not our role to define the procedure by which you limit a woman's right to seek an abortion. That is for you, Parliament of Canada, to decide. That is an issue of great social and political contention. It is not for the Court. It is for you duly elected politicians to engage in that debate across this country, as they have, and come back with means which we do believe are less intrusive in relation to the fundamental rights guaranteed in the Charter. I think a good example where the Court is sensitive to the fact that they have a role in Charter jurisprudence, the Legislature has a role in relation to the vindication and protection of rights.

And while, obviously, there will be disagreement and debate about the substantive result in any of these cases, my conclusion ultimately is that the Charter has been a good thing for Canadians overall. I think it has made us more aware of our rights. We have engaged in vociferous political dialogue among and between each other in society. That is important; that enhances the democratic process. I do not believe the courts are involved in a power grab at the expense of duly elected legislative representatives. There will be tension and friction along the lines, but that is to be expected

when one is dealing with such a fundamental constitutional change.

However, I believe it was an important change. I believe it was important in the life of this country to be able to say to its people and the rest of the world that we can articulate the fundamental values for which we stand, and we are willing to live by them.

Thank you.

MR. HORSMAN: Thank you, very much. Well, once again, a matter of great complexity has been introduced, and like aboriginal rights, it has given us on the Task Force a great deal to think about. Are there some brief questions that anyone would like to pose?

I have one then. And that is this, relative to the process of appointment of judges.

MS. MCLELLAN: Yes.

MR. HORSMAN: Which has been traditionally in Canada done up until recent years on the political appointment basis by the government in office at the Federal level. In view of the enhanced role that the courts have to play in interpreting the Charter, is that satisfactory in today's circumstances?

MS. MCLELLAN: I think that's a very difficult issue, but I do believe that a Task Force such as this should probably be addressing the issue of "accountability" of those who are appointed to the Supreme Court of Canada, and it seems to me that one process by which duly elected representatives of the public can be involved in the judicial appointment process is by changing that process as we presently know it, and I'm not suggesting necessarily going to an American system, although that has been addressed, and it has found favour with, I think, a significant number of Canadians.

And, of course, for those of you who are not aware, the American process involves the executive branch recommending a name for appointment to the Supreme Court of the United States, and then that person is put through a Senate ratification process and, ultimately, a recommendation comes out of that committee to the floor of the full Senate, and the full Senate then vetoes or accepts the executive's recommendation.

I think that there's some benefit to that approach,

Mr. Minister, in the sense that now the courts are dealing with a wider range of sensitive political issues, no one can deny that, issues that are are on the cutting edge of social and egalitarian reform in this country, that it may well be important to look at the means by which we appoint those people and know more about them.

I don't think the difference in the process was highlighted more clearly then when our latest justice to the Supreme Court was appointed, because at the same time you had the process of ratification of Justice Souter going on in the United States, and there you had lengthy Senate hearings and people got to know about him, and their elected representatives, those senators on that committee, got to ask him searching questions in relation to some of the most contentious issues with which the U.S. Supreme Court will have to deal.

And in our appointment process, as the Minister has suggested, the government in power at a given moment makes an appointment, and then we start asking all the questions about who this person is and where they've come from and the judgments they've written after that. Whereas, indeed, there might be some logic to asking those questions before someone is finally confirmed as a member of a body as important as the Supreme Court of Canada.

Arguments against that, I'm sure, you're all aware. The fact that it will detract highly qualified people from having to participate in the system when they have to go through this kind of rigorous soul-searching analysis and questioning at the hands of political representatives. However, I think again empirical evidence doesn't bear that out in the United States. And, indeed, most people who are called upon by the President do choose to go through the process, some making it more successfully than others.

I think that the job of Supreme Court of Canada Justice is so sufficiently important and prestigious and viewed as the pinnacle of the career for so many talented legal minds in this country that most people would be willing to participate in that more rigorous process, and, of course, if we had a reformulated Senate, it could be a role for that Senate. They might not have to conduct their hearings in public. They might indeed have an in-camera session and review of appointments to the Supreme Court.

There may be ways we can refine the American system if we have deep concerns that it will indeed detract talented individuals

from participating, but I think it's an important issue that one should look at.

MR. HORSMAN: Well, one of the things that our government wanted to see, by way of change, was to have the provinces involved in the process of appointment of Supreme Court Justices.

MS. MCLELLAN: Yes.

MR. HORSMAN: Because there is no role for this Senate and therefore no role for the component parts of the Federation –

MS. MCLELLAN: Yes.

MR. HORSMAN: --- to judge who the judges will be in our Canadian system. That is one of the things that we were seeking, and I think it's fair to say that that's an issue we're going to have to discuss in this Task Force.

MS. MCLELLAN: Yes, I think so.

MR. HORSMAN: Are there any other questions? Yes, Stock.

MR. DAY: An observation and a question. I think the fact that you talk about a process where people want to interview and quiz judges and put them through a fairly rigorous process, as is done in the States, it gives light to the realization that judges do make judgments based on their own personal tendencies.

That's why people want to know where they're coming from because there's a realization that even judges cannot always overcome with a super human feat the ability to make a judgment based on personal bias, and that's why that process is in place south of the border because people do recognize that. And that to me underlines the need, again, for a notwithstanding provision for provinces, so that the elected people -- it would still recognize, then, that judges not being elected still make judgments based on their personal feelings. And this is just in one area, one little out to mitigate the effect of that.

The question I have, if you can provide it for us,

you may not have it now, could you give us, since we're going to be talking to a large number of people throughout the province, your statistics, and you'll have to do that at a later date I'd imagine on the comment that --

MS. MCLELLAN: Very few laws have been struck down?

MR. DAY: No, this is totally unrelated. That the Charter has found enormous popularity in English Canada. If you could help us with that, I'd like to know the Alberta scene on that.

MS. MCLELLAN: Now, I'm not speaking about Alberta per se. I'm speaking about English Canada in contrast to French Canada. That is the only assertion I'm making.

MR. DAY: Sure. If you could just forward that to us, the stats on that, so we have an idea what we're going to face in our audiences.

MS. MCLELLAN: In relation to the point you raise about personal bias, I would like to say this. I think "bias" is a very strong word, and I would never use that in relation to our justices because I think "bias", again as the Attorney General knows, raises all sorts of -- the impugning the integrity of members of the judiciary, and while I may often disagree with what the Supreme Court decides, I do not indeed believe that they make their decisions in a biased way.

However, I will say this. Supreme Court Justices are human beings. They are men and women like everybody else, and therefore they cannot divorce themselves completely from their lived experiences.

Therefore, as in the case of Madame Justice Claire L'Heureux-Dube, she is a woman who for a long time has been a single mother and raised children herself due to the unfortunate death of her husband. That may indeed influence her. It has to influence her experience and the way she looks at her world, just as other justices will be influenced by other experience. That has to be a given. Just as, of course, legislators are influenced by their personal experiences.

However, I would say this, and Madam Justice

McLauchlin recently, at a talk at the law school at the University of Alberta, addressed this issue directly because, as I say, these nine men and women are more conscious of the concerns that you have in relation to their role than anyone else, and she said that while, obviously, you can't put aside your life experience, what the Court tries to do is look at the societal context in which an issue comes before them and attempt to gain from a review of texts, from previous case law, from the history of the nation, from the language of the right guaranteed itself, a sense of the purpose of the right and how far it should extend, and in what circumstances it should apply.

At the end of the day, one has to admit that this is a difficult process for the Courts, but I do believe they are consciously attempting to put aside personal bias as much as possible, recognizing it is never possible to put it aside entirely, and look to other larger contextual societal indicators as to what this right should mean. And the former Chief Justice Brian Dickson has spoken to this at great length in a number of his early Charter decisions, but I think at the end of the day one, of course, has to admit that each one of us is influenced by, but I would never use the verb "bias" in relation to a member of the Supreme Court of Canada.

MR. HORSMAN: Well, thank you. We're running a bit behind time. I know there are lots of questions that have been raised, and I know that Andrew would like to raise one, but I think we would perhaps hold that to our roundtable discussions.

I would like to take a break though. I think everybody would like to stretch a little bit, about ten minutes if we'd come back. After that, we will resume and hear Dr. Elton's comments. Thank you.

(Coffee break.)

MR. HORSMAN: I noticed lively discussion during the short break, and that's encouraging.

I'll just point out that before we go forward with our next presenter, for those of you who arrived late, those of you who wish to have additional information, receive copies of all the proceedings, we need your names and addresses to provide it to you. We will do that, and I understand just outside to my left there is a sheet on which you can register your names

and addresses, and you will receive, then, copies of all the information that we are gathering in, including the transcripts of the proceedings.

I'll just show you this document. This is a 74-page transcript of the first hearing of the Reform Task Force which took place last week in Edmonton. Copies of that are available to the public and to anybody who wishes it as will be the transcript of today's proceedings, so those are useful for you I hope.

Now, I'd like to just get on to the next issue. That really relates to some views on institutional reform and federalism. The presenter is Dr. David Elton, who for the last ten years has been president of the Canada West Foundation. He is also a Professor of Political Science at the University of Lethbridge in Southern Alberta. Born and raised in Calgary, he has extensive degrees both in Canada and the United States.

He's written numerous academic articles, reports, for businesses and governments, edited several books pertaining to Western Canada and headed a special task force on Canada/U.S. trade. He is very well qualified to give us his views on federalism and institutional reform.

Thank you for coming, David, and joining us this morning, and I'd like to ask you to proceed now with your remarks.

DR. ELTON: Thank you, Mr. Chairman. I'd like to start by congratulating the Alberta Government on its initiative in striking this Task Force. Over the past decade, as all of us in this room know, Alberta has taken a number of important initiatives regarding the renewal of our political system, and I want to point out how pleased I am that it was the Alberta Government that broke the logjam. It is the only government in Canadian history to take a concrete and positive step towards fundamental reform of Canada's political institution. I'm referring, of course, to the initiative that this government took in passing legislation regarding the election of Senate nominees, and more important, the precedent-setting Senate nominee election.

I know, Mr. Chairman, you played a very important role and were a driving force behind this, and I want to publicly thank you for that endeavor on behalf of all Canadians, and I say this notwithstanding Prime Minister Mulroney's retrogressive patronage appointments of the past several months, which I believe have set the stage for sweeping reform of the Senate because of the revulsion that Canadians have

and are exhibiting towards the Prime Minister for using such an antidemocratic procedure.

Certainly, for those of us reading the newspaper earlier this week, seeing the CBC and Globe & Mail survey results, know that this data bears witness to the depth of public discontent regarding that type of behaviour.

I want to also suggest to you that since the death of the Meech Lake Accord, I've perceived that the dominant mood regarding constitutional change has been a mixture of gloom and pessimism. Certainly, the media's breathless deathwatch virtually made all Canadians emotional participants in the country's longest running political soap opera, but I don't know why that commits us to a lengthy period of dispair. Quite the contrary. Meech Lake was not by any means the final answer to our constitutional problems. No one ever suggested it was perfect. Even its strongest supporters, whom some are at this table, apologized for its flaws and limitations from time to time.

The opponents of Meech Lake warned us constantly of terrible things that would happen if it was approved, yet now it's failed. Now we have a chance to do it over again, to do it right, yet Canadians are still discouraged. Still pessimistic. Why? Well, the problems are real. But so is the opportunity to build a constitutional reform package with fewer flaws. One that will strengthen Canada rather than weaken it.

The debate we are now entering into is the very thing that many people called for during the Meech Lake hard sell. And the fact that the agreement was so tantalizingly close for a few moments in June should give us real grounds for optimism.

Therefore, my comments to you today are going to deal with two things. First, the process, which we're now involved in right now, but the process that must be put in place to ensure the needs and aspirations of all Canadians, regardless of where they live, are dealt with. And, second, what I consider to be Western Canada's agenda for constitutional reform.

Let me first turn to the process itself. Challenge number 1 is to come up with a better way of changing our constitution then we have in the past. For decades, constitutional matters have been handed by a method that we sometimes refer to as "Executive Federalism".

Put bluntly, this means first ministers gather in a closed room, thrash things out, and then tell their legislatures and their citizens what they've decided. This method is deservedly in disrepute in the aftermath of Meech Lake. The death knell for executive federalism was rung by massive public unhappiness that focused less on the content of the Accord than on the narrow and secretive way that it was initiated and very nearly ratified.

Executive federalism, in my view, can now be seen for what it is in this context. I'm not knocking it in all contexts but in the context of constitutional reform, it is basically elitist, bureaucratic and antidemocratic. Now, at a time when democratic ideals are pouring through the huge cracks in the Iron Curtain, which no longer exist for all practical purposes, it is small wander that a broad coalition of Canadians baulked at swallowing the Meech Lake package merely on the assurance that our leaders knew best.

In the 1990s, people demand more accountability and more participation in the making of laws that govern so much of their lives. More power over the elites that sometimes seem to think they're above explaining themselves. A profound distaste for the closed door process that gave us Meech Lake is in a perverse way one of the results of Meech Lake that now unites almost all Canadians. Unfortunately, it doesn't translate directly into agreement about what should take place.

I'm not sure my list is up-to-date, but I can identify four provinces that have already taken steps towards new constitutional initiatives. Ottawa announced theirs yesterday. The diversity of methods adopted foreshadows that there's going to be disagreements in the process that lies ahead. Should one use only government party members on the Task Force as Alberta is doing presently on this Task Force? Should an all-party committee of provincial legislators be used? Should we take the Manitoba route and use a mixture of provincial legislators and respected citizens, or should we follow Quebec and include federal politicians as well, and as of yesterday, is the best approach to have no elected officials from the provincial or national level on the commission or the body that looks at these issues, and what about the proposals of the Reform party? Should a constituent assembly be elected to deal with the matter?

Well, during the past several months, many of us at the Canada West Foundation have been arguing the development of a

constitutional reform process that most closely approximates the democratic ideals which our Constitution seeks to establish and uphold. There are four basic principles that must lie at the core of such a process. First, the process must be nonpartisan. Governing parties must not monopolize the constitutional process because governments have a vested interest in many of the issues constitutional reform would involve.

As well, as we've well noted, governments come and go. During the three years of Meech Lake, three of the 11 First Ministers were defeated, and within the last few months two more have been replaced. All party involvement, a nonpartisan approach, gives considerable protection against a partisan undertaking that could be repudiated by a new partisan government at a later point in time.

Point Number 2. The process must be as open as possible. And in this regard, I commend wholeheartedly your comments this morning, Mr. Chairman, about the process that you've put in place. It's obvious that Canadians will be given an opportunity, Albertans here, in this process will be given an opportunity, and I certainly congratulate you for the open nature in which this is being handled. But it's a key element right through the process, not just at the initiation, not just at the revision, but also I will argue at the ratification.

Third, revisions to constitutional proposals must be permitted. It's one thing to put together a document. It's another thing all together to then go through the revision of that document.

And my fourth point deals with the last stage of that development which is the ratification. We must in some way involve the general public. One of the curious aspects of Canada's constitutional history is that neither the British North America Act nor the 1982 Charter of Rights were ever approved by any symbolically democratic act of the Canadian people. To perpetuate this error into the future would, in my view, generate even greater public cynicism and distrust at the end of the day, something that we've got far too much of already.

I don't for a minute suggest to you that the process that these principles would generate would be less messy, less expensive, or less frustrating. And I'm not suggesting it will be faster or necessarily more successful. However, when the ends and the means are part of the same package, we have accomplished the democratic process. Whether

it be a success or a failure, means that the responsibility will rest with all of us. Not 11 men or 11 legislatures.

Let me now turn to the Western Canadian agenda. One of the reasons I'm pleased with this Task Force and this initiative is because I believe it would be a fundamental error for Western Canadians to sit and wait until the Belanger/Campeau Commission makes its report and then quibble over details. Constitutional reform is not and cannot be a question of what does Quebec want, or what will Quebec settle for, or how much of Quebec's demands can we live with? To see the problem in those terms is to commit ourselves to react rather than to act. At best to discuss and fine-tune the aspirations of others rather than to articulate as Western Canadians our own hopes, our own needs, for the future.

And I'm not for a minute unaware of the fact that Western Canada is monolithic. It is not. And the role that we play will depend in no small part in how good a job we do in sorting out the issues among ourselves and among the various provinces in Western Canada. There is no room, however, for disagreement upon one essential element of constitutional reform. The need for more effective representation of the concerns and aspirations of Western Canadians within, as an integral part of, national government institutions. I'm referring here, of course, to the widespread and still growing support throughout Western Canada for Triple E Senate, directly elected by people, equal representation for all provinces, and with enough power to press regional concerns effectively.

We might argue about some of the details about the Triple E Senate. Indeed, I engage in it almost on a daily basis. Timing of elections, total number of Senators, whether Senators can serve in the cabinet, et cetera. But we in Western Canada cannot argue, however, about whether we need some way to check and balance the dominance of Central Canada within the House of Commons and the government the Commons supports. The way, in my view, is a creation of a Triple E Senate.

For over a decade, well over a decade, going on two decades, Senate reform has been the focal point of Western Canadian demands regarding constitutional change. Literally hundreds of meetings have taken place devoted in whole or in part to this subject. They've been sponsored by a wide variety of groups, organizations, legislative committees, government of Canada, of Alberta, of Ontario. The list goes on. In addition to

dozens of articles written in newspapers and public policy journals, there's been many comprehensive reports which have emerged and provide the basis for a blueprint for Senate reform.

What's the point I'm trying to make? Senate reform is essential to the future of Canada. Without Senate reform, Canada's political system will not be able to cope with the economic, political, or cultural realities of the 1990s and beyond.

To adopt the terminology employed, I think quite eloquently, by a roundtable participant at a Canada West-sponsored discussion on Senate reform held earlier this year, there are three different principles of equality which lie at the heart of Canadian society. Citizen equality, equality of provinces, and linguistic equality. The first two of these are common to most federations having legislative jurisdiction divided between national parliaments and provincial legislatures. The third is peculiar to Canada and is derived from a very important aspect of our history. The equality of citizens is realized in the House of Commons and the government that is created and maintained by its confidence.

However, the domination of the Commons by the populous central provinces is a necessary and legitimate consequence of this principle with which we've all lived. Cities like Montreal and Toronto elect more members to parliament then several provinces combined. The roots of the equality lie very deep in our constitutional past. The Canadian Charter of Rights and Freedoms formally entrenches the principle of one person, one vote. The B.C. Supreme Court has asserted the principle as a fundamental right. No question about it. Equality of individuals.

The one that a lot of people tend to overlook, however, is the equality of provinces which lies at the very heart of our system of government. The preamble to the British North America Act in 1867, clearly acknowledges it by beginning -- the document that created Canada begins with the statement -- "Whereas the Provinces of Canada and Nova Scotia and New Brunswick have expressed their desire to be federally united."

The Meech Lake Accord, and we're now up to well over 100 years, reinforces this principle in its preamble by stating, "And whereas the amendment proposed in the schedule hereto also recognizes the principle of equality of provinces", and so on the list goes. In recent decades, this idea of equality of provinces, of which Alberta has been a strong proponent

over a long period of time, has begun to obtain political muscle in Canadian politics, certainly in First Minister's conferences and in the 1982 Amending Formula which abandoned the idea, hopefully once and for all, of the idea of vetoes for some provinces but not for others.

Historically, the Senate, which in other federal countries is a form of provincial equality, was employed in Canada for the equality of arbitrarily defined regions creating two first-class province regions, and eight second-class provinces of lesser status. We tend to think of regions in this country, Ontario and Quebec, but they're provinces. They're not regions, and then we talk about the prairie provinces, but that's not a region. That's an entity that has three provinces in it, and anyone who lives in Alberta knows that "prairies" is a misnomer for Alberta. It's equally, in many respects, a misnomer for the other two provinces, and yet we perpetuate this idea.

Senate reform presents the opportunity of recognizing the second equality within the Canadian Constitution to share pride of place with the other two equalities. Now, I could go on and talk about the language issue, and I do in my presentation, but I'll leave that to be read later for those interested.

Let me go then to the point I'm trying to make. Senate reform is a long-standing demand whose fulfillment is long overdue. The problem is 80 years of periodic neglect, and I will use the word "bias" and at times outright discrimination on the part of our so-called National Government. We need and must not settle for less than institutional mechanisms for protecting regional interests and ensuring equitable treatment of the opportunities and problems of all Canadians regardless of where they live.

The problem that we've been struggling with is a mismatch between our federal society and our unitary so-called federal Parliamentary system. There's nothing in the structure of Canadian institutions, nothing in the way that governments are formed or broken, nothing in the way that national policies are made or revised, that highlights regional interests or concerns if those regions do not elect large numbers of MPs.

All of our national politics is subject to the implacable logic of rep. by pop. and its automatic consequence. The willingness to sacrifice the interests of minority regions to those of the center whenever the chips are down. Not always, but whenever the chips are down.

Where in Canada's national institutions is there a

forum in which the provincial interests will gain a hearing because they are provincial interests and not because they affect a certain number of Government MPs. Patently, it's not in the Commons, nor is it in the Cabinet, nor is it in the self-perpetuating federal bureaucracy, nor is it in First Minister's conferences. It isn't anywhere to be found.

Now, I don't want to leave the impression that institutions of institutional change are magic and the processes that surround them can be largely ignored. In many ways, the reverse is the case. The institutions are little more than formal arrangements that allow the processes to run their course. Although well designed, and this is what we're after in constitutional change and institutional reform, well-designed institutions can do a lot to set the parameters and priorities.

One of part of the Canadian political process that needs a great deal of rethinking is the firm and rigid notion of party discipline that has come to dominate our notion of Parliamentary Government, much more so, for example, than the British from whom we took the idea in the first place, so we've taken an idea that worked well under some circumstance, badly in others, and we've found a way to make it work badly in almost all circumstances.

As the century draws to a close, we're approaching a crossroads in the practice of democracy, a time when the old traditional forms and practices won't be good enough. We see one small sign of it in the way in which the nomination process has been blown wide open within the last 10 or 15 years and transformed from a controlled backroom process to a noisy public spectacle.

We see another sign of it in the demand for more frequent and open public hearings. The new democracy will not be one in which citizens take much on faith from people in official positions, and if elected representatives cannot adapt themselves to the demands for ongoing accountability and responsiveness, then their role will be of dwindling importance. The imperatives and potentials of modern technology push us, on the one hand, towards regional decentralization and on the other toward internationalization with the poor old 19th century Nation State caught in the middle.

The challenge we face is to use the new technology to fit a democratic future. Ancient civilists, like party discipline,

will not hold back the tide. Indeed the longer that governments and the members of their caucus try to hide behind slogans, the more sweeping the transformation is liable to be.

I do not find it an encouraging sign for the future of my province that this committee, charged with planning the next phase of constitutional reform, should be drawn exclusively from within the ring of party discipline. I do, however, recognize, Mr. Chairman, that this is but the first phase of a four-phase process which I encourage to be much more nonpartisan and would anticipate from the discussion you had this morning will, in fact, accomplish that goal, and I commend you for that direction. The Meech Lake experience has taught us that executive federalism, as it has been practiced in the last 40 years, is not the right way to go about changing Canada's Constitution.

Let me then just come to a conclusion. Much work has been done on constitutional reform, on Senate reform. All that remains is the creation of the political will to tackle the problem openly, directly, and with optimism. We should expect nothing less of those that engage in constitutional discussions over the coming months.

Thank you.

MR. HORSMAN: Thank you very much, Dr. Elton. Very provocative thoughts, and I know that from our past association, you have worked very hard trying to gather in and develop and represent the interests of Western Canada, Canada West Foundation.

Just one other comment. Those of you who have questions written out, there's a young man at the back who's going to come forward, and he's been collecting some. Bill, would you put your hand up or come to the front, and then people can see you without turning around, pick up the questions, and then bring them up to the table, please. And we can get to those a little later on.

Just to remind you once again that if you wish to leave us your names and addresses, we will make sure you get copies of documents, and if you wish, we will also try and provide you some written material. I know that there's some questions that have arisen, Stan Schumacher, and then Jack Ady, Gary Severtson.

Just before I do that, I do want to thank you for

acknowledging and expressing, first of all, the concern about the partisanship issue and then acknowledging in the conclusion of your remarks the fact that we are determined, in fact, in that process to bring it to all-party consideration in a very thorough discussion in the Legislative Assembly, and that is where, I think, the Public Affairs Committee hearings will attract, perhaps, very concentrated attention.

The only problem with that and it's one we've been struggling with, is that because the Legislature is in Edmonton, we want to get Albertans inexpensively, if you will, to be able to make their representation and the fact that it would require a fairly significant cost for people to travel to Edmonton, we're going to have to devise ways of getting out and back information.

With today's communication society it may not be appear to be that difficult but, in fact, it is challenging to state issues in relatively simple form and get back answers in that way, but we will struggle with that and any advice you can give us on that, we would appreciate.

First of all, we'll go to Stan Schumacher and then Jack Ady.

MR. SCHUMACHER: Thank you, Chairman. I'd like to express my appreciation to Dr. Elton for his very provocative and very informative presentation.

I'm just interested, though, if he could help me with the process. I agree with him that we are now in a position that it's back on Monday morning constitutionally speaking, and I just didn't understand how he saw the process working or how it should work in order to get a Constitution approved for a federal country involving particularly the ratification process without involving at some stage the political elite, if you want to characterize it that way, of the elected leaders of our country.

Because it seems to me that whatever happens, if it has to be subjected to a national referendum, that that really impinges a great deal on the quality of the partners in our federation or confederation, and so I'd just like a few comments in that area.

MR. ELTON: Well, there are other examples around the world of people who have resolved this problem, not necessarily tidily or in a manner

that would lead one to conclude that this is the quick simple fix because there isn't a quick simple fix. If anything comes out of this morning's discussion, it is there's no quick simple fix to aboriginal rights, to the Charter, to institutional reform. We shouldn't expect that. But there is ways to deal with this in terms of that final step, that ratification process.

Australia uses one that I think we should look at quite carefully. It has a lot of problems with it, but it also has worked. Their society hasn't fallen apart as a result of it, and they've had some problems with it. What they do is require a referendum on a constitutional amendment, and you have to have a majority of votes in every one of the states. Now, that's an effective way of handling it.

Now, you say, wait a minute, hold on. That means, and we always use this example, Prince Edward Island will be able to hold up the future of Canada. Well, in some ways, that's right. It does mean that, but that's not necessarily a bad thing. If we can't convince the majority of the people in Prince Edward Island that the kind of constitutional package we're talking about isn't in their best interests as well as the rest of Canada, maybe we better go back to the table and make some changes to it.

There's nothing final about this process. When we put a deadline on a specific date, and we think that that's how you arrive at a Constitution, in my view, is wrongheaded. We have to look at this as a developing evolutionary process, and under that light, we may fail in a couple of instances. We may have to go back to the well a number of occasions, but what we come up with finally will be something that is so refined, that I think we'll all be better off as a result of the process.

MR. HORSMAN: Well, thank you. We discussed briefly last week with Dr. Watts the issue of the Australian example, and interesting to note, the most recent, and it's happened before in Australia, efforts have been made constantly there through the referendum process to limit the power of the Senate.

DR. ELTON: Or abolish it.

MR. HORSMAN: Or abolish it by the more populous states through the House of Representatives. That's always emerged through that process, but

in every instance, the people have said, "No, we don't want to limit the power of the Senate or to abolish it," so it's an interesting little thing to regard from another system which you were examining.

Jack Ady.

MR. ADY: David, I really appreciated your overview and your position which you stated very clearly on a variety of issues, especially the one on executive federalism. I do say, though, that although I'm not going to be defensive of it perhaps you were a little hard on the Meech Lake process, and I think it's necessary that we remember that although there was an agreement at Meech Lake, it was not ratified that day, and there was a three-year process in there for some things to happen, and we all know the events of that, and I guess many would say the system worked. Those who were opposed to Meech Lake would say that eventually the system worked and the agreement was never ratified.

There was considerable effort made to have public input into the Meech Lake process during that three-year period. I know in my constituency, I endeavored to hold public meetings, but there really was no interest prior to us passing in our Legislature, but we went through that process in an effort to try and get that. And, of course, the interest as we all know came when Bourassa passed his French Language Law, and all of a sudden, the red flags went up and everyone was interested in Meech Lake, and the story is history now.

You mentioned that Meech Lake was not the total answer, and I don't think anyone ever thought that it was, and I'm not here to defend it today,but in reading some of the things that you've written and some of the things that you've said, you've also said that Senate Reform is not the total answer to fixing Confederation as we have it in Canada today. And I just wondered if you would expand a little bit on that.

If Senate Reform isn't the total answer, and I'm certainly not here to say that it is, I'd really like to draw on your expertise and experience and knowledge on what other institutions might need to be tampered with or fixed or revised and in what way.

DR. ELTON: First, under many circumstances, I'd be the first to defend executive federalism as a way of doing things. I mean it has delivered

a phenomenal standard of living, and by and large the Federal and Provincial Governments cooperate 99 times out of 100, and it really doesn't mean whether we're talking about services delivered to agriculture or the environment or whatever issue you want to point to.

What I'm saying is in terms of constitutional process, however, sure it was open at points, but it was like an open-and-closed door. You got a peek in, and then they closed it, and then you got a peek in and then they closed it. But the basic flaw in the Meech Lake process to me was the seamless web argument. Why have a public meeting and bring everybody to a room and have people travel across the country and so on and so forth and tell them before the meeting starts, "Sorry, we're not going to change anything here."

That was the real flaw to me in the Meech Lake process. I'm convinced that had they changed some very small things in that Meech Lake Accord, we'd have it now, and we'd be on to talking about Senate Reform as was promised in that process. In a very different context we'd still be holding this meeting, but we'd be focused in a different way because of that seamless web process.

Now, what has now begun, I think, politicans right across the country have learned an important lesson. Welcome to the 20th century. This is a democratic society, and that doesn't mean they aren't democrats. It means that they overlooked and believed that they could perpetuate one more time a process that had worked many times in the past, but it isn't working anymore. It's broken.

The Senate reform package. One of the things that people misunderstand, in my view, about the Senate reform package is not that you simply have elected people, and they go down there, and you change the mix of where they come from, but it's the impact that it has on the overall system, particularly party discipline. If you have an elected Senate there, where these people are not part, because of the way you structured that Senate, of those dominating parties at the center, you're going to change the way MPs function Day One.

The day that Senate comes into place, Members of Parliament are going to start to be more independent, more responsive to their constituents because they know if they're not, there's someone there to replace them right there in the system. There they sit.

And they will also know that there are other career opportunities and other ways to look at things other than from within the party discipline format and who sits on which committees when and where your office is located and all the fun games that are played on Parliament Hill with Members of Parliament. That whole process will begin to unravel is a good way of putting it. Thanks, Stan. I think you have an idea of what that process is all about. It will begin to unravel.

So what I'm simply saying is that I don't think that any society that has been together as long as we have can reform the whole process all at once. At the end of the day, we're going to take certain things and change them now, and then we'll reconsider it 10 or 15 years later. But to me, the Senate reform package is essential because it will change the way in which people think, just like the Charter.

The real impact of the Charter, as was argued this morning, is that it changes the way people think about how to do business and the way they go about making laws and so on, and that's what Senate reform will do, is it will change the way people think, whether it's an NEP or whether it's procurement or whatever it is. The Federal Government will be a different entity the day we have Triple E Senate. The Prime Minister will think differently, and the discussion around the cabinet table will change, and there won't be a Senator in the room.

MR. HORSMAN: Thank you. Gary Severtson?

MR. SEVERTSON: Thanks, Mr. Chairman, my question was in the line of Stan's, but what I would like to pick up on is Mr. Horsman's comment that in Australia it's never been changed by a referendum. Now, how would we achieve the example of Senate reform if we had the same ratification and equality of provinces? You used Australia as an example, but if they've never changed the Constitution, it is not really a good precedent to get the Senate changed.

DR. ELTON: Well, no, they have changed their Constitution. What they haven't changed is in regard to dealing with the Senate. That's all they haven't. It will be difficult, and it will have to be in the package, and the way that package is put together, there's going to have to be some trade-offs, and

that's the whole idea of broadening the package to look at the kinds of things you listed this morning in your introductory remarks when you were talking about the parliamentary system, the nature of the provinces, the division of powers, language, multiculturalism, and so on. That's going to have to be very politically astute and elites will be involved in it, Stan, in a very direct way, and I wouldn't want to exclude them. That has to be an integral part of it.

MR. SCHUMACHER: I don't know whether they really are elites. They're characterized as that.

DR. ELTON: Well, they are by position, just by virtue of the stature they have in the system is what we're talking about. That's what I mean by an "elite". They will be involved in the process. But that package will be shaped in a way in which it's going to meet the needs, to some extent, of the people of Newfoundland. And they're not going to like it all. I would really be surprised if anyone in this country can come up with a package that would satisfy anyone in this room. But we might be able to come up with a package that will satisfy enough of your needs that you'll be able to support it on balance.

MR. HORSMAN: Thank you, very much. Well, we've gone through the process now of hearing the three presenters, and I have some roundtable discussion ideas here. We had some things which we deferred, I think, to this particular portion, and I have a number of questions which have been submitted to me. I'm trying to put them in sort of general order because there's some which relate strictly to issues of the Charter, some which relate to process, and some which relate to Senate reform, so I'm trying to sort these out as I go through here. In terms of the roundtable discussions we might move into now, and then I do want to get into these questions about twelve o'clock, and that would get us on to time.

Perhaps Andrew might respond to some of the questions that came forward from Pearl Calahasen in the opening session relating to the issue of aboriginal self-government.

MR. BEAR ROBE: Thank you, Mr. Chairman.

First of all, this type of question is always raised

when we talk about Indian self-determination in Canada. Well, how are we going to accommodate all those small Bands who are in the northern regions of Canada that are hard to get to, and economically speaking, they are very depressed economies, and so on and so forth.

First of all, I think in light of the new, I would say, political sophistication of the First Nations of Canada and their leaders, I would say that the sooner we move away from using the term "Bands" it would serve our self-respect, meaning us, ourselves, as Indian people, because "Bands", as far as I'm concerned, is a derogatory term.

Well, one day I saw a cartoon in the Calgary Herald where an Indian Chief was over in England talking to a band leader from England. This band leader, of course, was a rock band, and he had green hair sticking straight up, with earrings on his nose and in his ears, and he was talking to this Band Chief from Canada. And the Band Chief was asking him, "Where is the meeting of the government?" And the cartoon character of the rock band says, "Well, which Band do you belong to?"

So the sooner we get away from the use of the word "Band" -- I dislike it immensely myself. It's in the Indian Act because when you refer to a Band of Indians, you think of a band of dogs or a band of wolves. What our proper name should be is "First Nations" as stated in the Royal Proclamation, or "Tribes", "Tribes of Indians". And John A. Macdonald himself, the first Prime Minister of Canada, referred to the Indians of Canada as Nations or Tribes of Indians. That is the proper terminology, and we, ourselves, are going to strike that term "Band" in our usage, in our official documentations, and "Band Council", what I refer to as Band Bylaws, so we are going to simply rename them as Siksika Nation Laws or Ordinances.

Now, getting directly to the question of how we're going to organize all these small northern Indian groups. Well, I would say that will resolve itself anyway in the process. We already have within Alberta certain tribal organizations which take in maybe eight or ten different separate tribal entities like the Lesser Slave Lake Regional Council which Pearl Calahasen represents.

Now, that Lesser Slave Lake Regional Council, for all intents and purposes, operates like a government for about eight or ten different tribal entities. They all are Cree Nations. They all speak Cree, from what I understand, and they could form a form of an Indian government.

And also, the Tribal Chiefs Association of Treaty Number 7 here in Southern Alberta, with possibly the exception of the Stony Tribes, who are really not part of the Blackfoot Confederacy, but they have an interest in the history themselves. For instance, the Treaty Chiefs of Southern Alberta could form sort of an Indian government structure. And, also, the Tribal Chiefs Association of Northeastern Alberta is another Regional body of Indian group.

Now, the alliances formed for the definition of Indian governments could coalesce along those lines or we have three Treaty areas in Alberta, Treaties 6, 7, and 8. Now, we could organize Indian governments along those lines respecting individual autonomy at the tribal level, for instance, Siksika Nation level.

That is all I can say about it now. It's an evolving process. And the Indian First Nations in Alberta are intense in their studies and in their discussions amongst themselves. Next week we're going to have an All-Chiefs Conference in Hobeema, and we'll be discussing these issues of how can we organize ourselves along political lines, not only for politically speaking but jurisdictional-wise.

Maybe, Pearl, I'll just let you ask me your questions again.

MS. CALAHASEN: Actually, the second question I asked was relative to the size of the Bands or, as you say, the different Nations -- I call them Nations because that's what they call themselves -- and how there is such disparities between those particular ones and how they are going to govern themselves, but I think you answered that one quite well.

The other one was, of course, you answered again. How you would align yourselves together to be able to bring out the idea of whether it's the sovereign nation or whether it's the self-determination route and how you are going to be able to align yourselves to be able to address the nation view of being, like you gave the examples of German and English.

And the other one was also the role of the traditional authority and what laws would be primary, and I think that would be more in the organizational than it would be in the initial stages. But I think that's something that has to be discussed, which would give us a view as to how we can look at that in the context of Canada as a whole or as a whole

nation and a country and how the Indian groups would see themselves either being part of it or separate from it or how they would sort of align themselves in that particular view.

MR. BEAR ROBE: Well, again, I would say that the idea of nationhood for Indian First Nations in Canada does not entail complete independence from Canada. Now, that is a sad misunderstanding of what we are trying to do. What we are trying to do is establish for ourselves a direct participation in the constitutional framework of Canada to protect our rights, Section 35 rights, the Treaty rights. Protection of the Indian title or the aboriginal title to ensure that the federal Government of Canada fulfills its outstanding obligations for comprehensive land claim settlements and also to ensure that the federal Government of Canada and the provincial governments fulfill their obligations under the specific land claims process under the treaties.

So we cannot do it if we lean towards assimilation or integration with the dominant society because under the dominant society we have no voice to protect our rights. That's essentially what we're after.

It was mentioned here -- the fact that the Charter was to protect minority rights against the tyranny of the majority, is what we're talking about when we're talking about Indian self-determination. What we want to do is establish a system of government specifically for Indian First Nations to participate within the Constitutional makeup of Canada and also to protect our rights. And that is what essentially is meant. And that's why I used the term "shared sovereignty". Now, that shared sovereignty has to be worked out through such roundtable discussions as here between men and women. And I apologize for using "men" exclusively without reference to "women". That was pointed out to me. But between men and women around this table.

So that is, in a nutshell, what we're talking about. And as already mentioned here by the speakers, it's a very complex topic, and there's many, many volumes of legal articles published on the subjects, including the treaties, and doctorial thesises are given out on the treatment of those topics, and so on and so forth. So it will take, I would say, many years to work out the fine-tuning of what is actually meant by Indian sovereignty within Canada, but we are working towards that. Remember that Canada is still a very young country. Only 100 years ago, we were still living in teepees,

hunting the buffalo, and 100 years ago we drank from the Bow River. It was a pure mountain stream about 100 years ago, and 100 years later we have concern about river pollution. So therefore we have a lot of work ahead of us to do to prepare ourselves, our children, I would say not for ourselves but for our children and grandchildren, of the kind of Canada they will be living in in the 21st century. That's what we are really talking about today, the work before us. And we are simply the servants of that process, including the political elites, and I would say bring in the economic elites to lessen their demands on the resources of Canada. To think about the little guy, the little guy out on the street who doesn't have a home, who doesn't have three square meals a day.

The executive federalism has to think about the little guy on the street. There should be no homeless people in Canada. And it's a sad statement on the state of affairs in Canada when you read about in the papers about the homeless Torontonians who eat out of garbage cans. That should not be when we live in the land of plenty here in Canada.

And the economic elites of Canada, North America, have to give in a little to become flexible in their thinking about profit maximization, the profit motive to run the machinery of the economic fabric of Canada. Their thinking has to be changed too, not only the politicians.

Sorry, I got off on a little tangent there.

MR. HORSMAN: Well, we're having a roundtable discussion. We're open to all kinds of comments. Other comments around the table? Yes, Stan.

MR. SCHUMACHER: Thank you, Chairman. I'd like to enquire of Ms. McLellan about the Charter of Rights and this position we're in now as being somewhat like Monday morning on the new Constitution, with many things being up for discussion.

Dr. Elton said that he interpreted the Charter of Rights as enshrining one man, one vote, representation by population. I really don't agree that it does.

But will the Charter of Rights as it presently exists put any restrictions on what can be put on the table? Does it have any centralizing effects in our federation now, and will it prevent some

decentralization or discussions about a new distribution of powers that might be desired?

MS. MCLELLAN: I think the long-term effect of the Charter may be centralizing in this sense, in that, ultimately, you have one Supreme Court which is articulating the definition of the entrenched rights. And one would presume that unless that articulation is opted out of, there would be a move toward one unified definition or acceptable working definition of many of the rights that are found in the Charter. And I suppose in that sense it may have a centralizing or at least an effect of moving to sort of one national concept in relation to the nature of the rights guaranteed in the Charter.

But I think on your other point in relation to whether the Charter presents any constitutional impediment to further constitutional reform of institutions of government, for example, including the Senate, I think the answer is probably quite clearly "No".

And I say that with some confidence after a case involving the B.C. Court of Appeal in which Tony Penikett, the leader of the Yukon Government, attempted to stop the Meech Lake Accord on the basis that he believed the Meech Lake Accord violated the Charter of Rights and Freedoms, in that it denied the Yukon basic rights of equality, among other things. And the B.C. Court of Appeal said, No, to take that approach would make the Charter paramount to the very amending process. If the amending process in terms of amending the Legislatures or the Senate or the Courts had to respond to values found in the Charter or specific guaranteed rights, and what the B.C. Court of Appeal said No, is that, indeed, no part of our Constitution is really paramount over any other part.

But having said that, I read the B.C. Court of Appeal's approach as saying actually the amending formula is paramount over every other part, in the sense that our political actors, through whatever means they choose to adopt, can amend any part of our preexisting Constitution including the Senate, the Legislatures, and the Courts. And my view is that there is no constitutional impediment found in the Charter to that process.

MR. HORSMAN: That was a particularly interesting case because the trial division went the other way.

MS. MCLELLAN: That's right, yes.

MR. HORSMAN: And that was a Queen's Bench Justice from Alberta who made the original judgment in the Yukon case.

Sorry, Andrew?

MR. BEAR ROBE: I'd like to ask, first of all, a comment and a question for Anne. The comment is that, let's give credit where credit is due and the credit is to Elijah Harper, the Manitoba MP, who did what many Canadians would like to have done but did not have the opportunity simply because they're not part of an elected government, so let's give Elijah Harper, again, credit at least from us aboriginal people of doing for us to bring the demise of the Meech Lake Accord.

My question is, in view of the fact that the Supreme Court of Canada struck down the French Language legislation dealing with signs either inside or outside storefronts, and in view of the fact also that Quebec is not a signatory to the Constitution of 1982, is it constitutionally correct for Quebec to use the Section 33 override clause in order to force its use of the French Language? What can it do under the French Language legislation?

MS. MCLELLAN: Okay, in relation to your first point in relation to Elijah Harper, indeed, I did not mean to ignore the role of Mr. Harper in the defeat of the Meech Lake Accord. In fact, his presence and the fact that he is an aboriginal Canadian speaks and confirms the earlier point I made which was, indeed, the fear on the part of women, aboriginal peoples, and others within Canadian society that the Meech Lake Accord might well limit, denigrate, or take away from the gains they had achieved in the Charter or in the patriation process in 1982. I recognize, of course, that Section 35, recognizing existing aboriginal rights, is not found in the Charter per se, but was part of that package and is a rights-granting provision. So, in no way do I mean to detract from Mr. Harper's role in the defeat of the Meech Lake Accord.

In relation to the use of Section 33 by Quebec, I suppose to some extent one might suggest it's a little hypocritical in that in 1981 when Rene Levesque left the table, on that fateful November morning, he denied the legitimacy of the proposed and ultimately adopted reforms to the

Canadian Constitution, and therefore, I suppose, if one denied the legitimacy thereof, you might make an argument that inconsistent with that denial of legitimacy would be a desire not to use any part thereof, including Section 33, the opting-out provision.

But I think the way Premier Levesque and his ministers in Quebec saw it was that, indeed, because this document was so profoundly illegitimate in the Province of Quebec, that they would use any means provided to them by the Canadian polity to ensure that it didn't apply to them and interfere with their collective aspirations. And so consequently, while I guess we could quibble about the logical consistency of the Levesque Government using 33 in the omnibus way it did, and, of course, the Bourassa Government does not do that, they opt out only on a specific piece-by-piece basis and have used it very infrequently, but, of course, the sign law being an example.

I think at the end of the day, the Supreme Court of Canada said it didn't matter whether Quebec had agreed to the Constitution package of 1982. Their consent wasn't required. It applied, once ratified, across the country, and therefore, Mr. Levesque was in a position where he could invoke any one of those sections because the rest of the Charter applied in his province without any ability on his part to prevent that. So I think that it was to be expected, and I don't think anyone was surprised by his use of the opting-out provision.

MR. HORSMAN: Stock?

MR. DAY: Jim, my first question that I left on the table for the break has been dealt with in terms of the shared sovereignty question in terms of Andrew indicating that that is something that has to be worked out. The second question which I had left was the question of land settlements and, Andrew, you referred to pre-European settlement and certain rights that were inherent there to the aboriginal people, so are you saying that in terms of land settlements, you're giving consideration to all lands in Canada or only those lands defined in subsequent treaties?

MR. BEAR ROBE: Well, in my remarks I stated that all of North America is subject to Indian title, so therefore, within that context, yes, all lands in North America are subject to land claim settlement because the need to

do that was recognized by the British Imperial Government in 1763 after the Seven Years War, and the Royal Proclamation of 1763 gave life to the Treaty-making process as we know it in Canada and also in the United States.

When the United States broke away from the British Imperial Government, it continued that process to make treaties with the Indian Tribes for their lands, whereby the Indian title would be dealt with so that the Crown's title to the lands in North America would become unfettered and unencumbered by the Indian title. Now, you have to do that because of dictates of international law. And there are cases like with the Western Sahara case states that the sovereign cannot simply go into a land belonging to aboriginal and go ahead and assert its title without addressing the prior existing rights of the aboriginal population. So that happened in North America through the Royal Proclamation of 1763, and subsequently, we had the 11 Treaties in Canada.

Now, supposedly, the Indian title has been set aside in those 11 Treaties in Canada which started in pre-Confederation anyway, until as late as 1923. Now, the parts, the huge portions of British Columbia, the Northwest Territories, Quebec, and the Maritime provinces have never entered into land secession treaties. They still have to deal with the Indian title question, and that is why we have such problems with the land claims pursuits by the Indian Nations in those areas of Canada, because their Indian title has never been dealt with sufficiently by the Crown, whether it be the Federal or the Provincial Crown, and that has to be done. The sooner it is done, the better it will be for everybody. The business enterprises want to log the timber, but they are bogged down by land claims disputes between the Province of British Columbia and, for instance, the Nishka (phonetic) Nations, and in addressing the problems with offshore fishing for the coastal Indian Tribes. So therefore, the sooner that Canada deals with it and the provinces, and lay it aside, the sooner that we will all learn to get along.

Some legal scholars argue that the Crown's title is the derivative title from the Indian title, so therefore, within that context, the Crown has no recourse other than to deal with the Indian title question sufficiently, equitably, so that these long overdue problems can be laid aside and to deal with contemporary issues. For instance, shared sovereignty.

MR. HORSMAN: Well, thank you very much. I think we've been at

this process for three hours now. We've touched on three very important topics. I think the fact that we spent a whole morning just touching on three topics is indicative of the complexity of the constitutional challenge that we, as Canadians, face. So I'd like to get a couple more comments in, and then try to deal with the questions that have come forward as quickly as possible, making it clear that we just have too many that have been engendered today to address them all, but we will respond in writing to those whose addresses and names are either on the cards or on the mailing list, and we'll try to make that part of the record in terms of our response.

Some of these are addressed specifically to individual presenters this morning, and we'll ask them to, hopefully, participate with us beyond just this morning in helping to respond to some of the questions as well.

But Jack Ady wanted to get in, I believe, and Pearl.

MR. ADY: My question I'll keep very brief in the interests of time, and my question goes to Andrew. In his presentation, he made a reference, and this is a point of clarification, to the system that the United States has with the native people working well. Does that mean that you endorse that system?

I'm not totally conversant with that arrangement that is in the United States, but is that something that the aboriginal people in Canada endorse as workable?

MR. BEAR ROBE: I'm not saying it's working well. All I said was that the U.S. Government has dealt with the notion of Indian sovereignty in its dealings with the American tribes, based upon the trilogy of decisions by Chief Justice John D. Marshall of the U.S. Supreme Court in the 1830s. So, therefore, they have dealt with the concept of Indian sovereignty way back in the early 1800s without any great amount of problems created with American sovereignty.

So my point was that here in Canada, if we dealt with the concept of Indian sovereignty, it should not upset the present-day workings of our constitutional structure and division of powers, but what has to happen is some kind of an adjustment to the present division of powers to make room for the shared sovereignty of Indian Governments within Canada.

So we have to look to the United States experience in order to make some comparisons to avoid the -- I'm not saying it's working perfectly in the United States, but what does happen in the United States is that Indian Governments make their own laws, and the state government laws have no application on Indian Reserves, but the Federal Government still has the overall supreme authority to make rules on the effect of Indian laws upon the federal jurisdiction field. And in the United States, state laws and Indian laws are concurrent in a lot of areas.

MR. HORSMAN: Well, thank you very much. Well, I'm going to try and tackle some of these questions this way. I have a number of questions for Anne McLellan. First I'll start with them.

"Assuming your premise is correct that the utility or primacy of the Charter is viewed differently in English Canada than in Quebec, what legal balance are you suggesting is appropriate, having regard to the fundamentally different political and cultural objectives of English and French Canada?"

And a supplementary question which I think could be answered at the same time is this: "Do Francophone communities outside Quebec have a different view of the significance of the Charter of Rights and Freedoms than the Quebecois?"

MS. MCLELLAN: In relation to the last question, absolutely. Francophone groups outside Quebec indeed see the Charter as one of the most important means by which they can begin to ensure their survival. And we have seen this here in the Province of Alberta where through the use of Section 23, a Francophone minority outside Quebec is seeking to stave off what they would describe as assimilation. So, indeed, Francophones outside Quebec are a distinct minority who see the Charter in much the same way that English-speaking Canadians do.

And I think what I should have done, because language is so important in this whole area, as we've seen in our discussion of Bands and Tribes, I think precision should always be strived for. So consequently, I guess I would speak in my original point in relation to the different views of the Charter in relation to not French-speaking Canadians but Francophones within Quebec and their view of the Charter in relation to other

Canadians. And I think that would probably be a more appropriate encapsulation because, indeed, Francophones outside Quebec view the Charter as nothing less than their means to survive if they are to survive at all.

MR. HORSMAN: How about the legal balance issue that was raised in the first part? It was actually a separate question.

MS. MCLELLAN: Can you just go over that again, I'm sorry.

MR. HORSMAN: "Assuming your premise is correct that the utility or primacy of the Charter is viewed differently in English Canada than in Quebec, what legal balance are you suggesting is appropriate, having regard to the fundamentally different political and cultural objectives of English and French Canada?"

MS. MCLELLAN: I'm not sure in what context that question is speaking. For example, I do believe that Quebec, if it is going to participate in a next round of Constitutional negotiations at all in relation to a desire to maintain something we know as Canada, they will not be very happy with the application of the Charter in the Province of Quebec. And indeed, they will find particularly offensive a section like 23 which guarantees to the English minority certain education rights which they believe are counter-productive to their desire to establish Quebec as a distinct Francophone community.

So that if Quebec comes to the table, they, I guess, could argue for non-primacy of the Charter entirely, which I think will enrage the rest of Canada because of the deep commitment to the discourse of rights that we see developing. And you can talk about whether that's right or wrong, but it's a fact of life. So that I think that will be a major impediment to any kind of constitutional/legal resolution of the current issues.

Quebec already, of course, can opt out of most of the Charter by virtue of Section 33. They might well simply ask that all of the Charter is, if you like -- what would be the word -- opt-outable? And, of course, some provinces might well find that very useful for their own purposes.

For example, I could imagine there might be other provinces who might like to opt out of, at least, parts of Section 23 in relation to Francophone minorities and their provinces. I don't know.

MR. HORSMAN: They can't.

MR. MCLELLAN: No, but I'm saying that if in the next go-around, the other provinces might concur or assent to a request on the part of Quebec that if the Charter is to apply throughout Canada, including Quebec, that everything should be subject to being opted out of, not merely certain provisions, which would then provide Quebec arguably with the kind of protection it would need to protect its cultural integrity.

The problem with that is, of course, that the use of Section 33 probably becomes problematic. And as I say, Bourassa has not used it very much. One saw the reaction of English Canada when he did use it. I think that if we were in a situation where the rest of Canada saw Quebec opting out over and over and over again, of course, that's what happened with the Levesque situation, I think that will continue to provide a festering sore in relation to the state of this federation.

MR. HORSMAN: Could I just say, I take it from your remarks, that you do not think there should be any legal balance in favour of Quebec in terms of their ability to opt out of the Charter that other provinces don't have?

MS. MCLELLAN: I don't think it will work nor will it be acceptable to the rest of Canada to present Quebec with a means to limit the application of the Charter in their province which is not given to other provinces, and I think in that sense we are speaking to equality of the provinces, in that limited sense.

MS. HORSMAN: Now, the next subquestion here is, "Is the notwithstanding clause the one great weakness in the Charter?"

MS. MCLELLAN: Well, I think it depends to whom you speak. The notwithstanding clause would be viewed as the one great plus in the Charter in the Province of Quebec.

MS. HORSMAN: From your perspective, I think.

MS. MCLELLAN: Personally, I do not believe that one can speak of entrenched rights when, indeed, any given province can erase fundamental

rights through simple legislative act. And that, indeed, when we speak of fundamental rights, you may have a right viewed as fundamental in Ontario but not Alberta or not British Columbia. I think that that is counterintuitive to the notion of an entrenched Bill of Rights.

However, Section 33 is viewed as Canada's own unique compromise and contribution to the world dialogue in relation to entrenched Bills of Rights, and I guess my view is that I would rather a Charter with it than one without it. So consequently while I think in the next round there will be a request for it to be removed by probably both some federal politicians as well as some provinces, I think that not only because of the presence of Quebec, but in relation to other province's desires as well, Section 33 is here to stay.

MR. HORSMAN: "Could the word "mankind" to represent male or female be implemented in the Charter of Rights, or is it a semantic issue?"

MS. MCLELLAN: Sure, although "mankind" also uses the male denominator. I think "peoplekind". I don't know. But I personally think that if we use gender-inclusive language, we don't necessarily have to have gender-neutral language. I do think language is important, and language can be very marginalizing and it can exclude people unintentionally, and obviously I'm aware of this everyday in my classes, so that I think it is not a trivial point to raise. I really don't care what the exact language is as long as the language used is inclusive of all Canadians.

MR. HORSMAN: "In the Charter of Rights, we are deprived of one of the most basic rights in this political document, the right to own property. Why?"

MS. MCLELLAN: You are denied the right to own property for a number of reasons. One of the main reasons being the views of then Premier Peter Lougheed and some other Western Premiers.

MR. SCHUMACHER: Prince Edward Island.

MS. MCLELLAN: Pardon me?

MR. SCHUMACHER: Prince Edward Island, I believe.

MS. MCLELLAN: Yes, Prince Edward Island. As we see with constitutional affairs, unique alliances and strange bedfellows are often in existence. I think that the New Democratic Party, for example, at the national level argued strenuously against the inclusion of property rights as did, as I said, Premier Lougheed, you're quite right, the Province of Prince Edward Island.

The reason why, for example, Premier Lougheed would be concerned about the inclusion of property rights is that the provinces are given in 92.13 the power over property and civil rights. It is their major power in relation to legislative distribution. And if, indeed, property were constitutionally entrenched, it's going to have its greatest import in relation to provincial issues, not Federal issues, although, obviously, the federal property interests will be implicated.

But I think the Premiers were on to something when they said, if we entrench property rights -- depending on how "property" is defined and, of course, in the law we are now all talking about the "new property", and we're talking about entitlements like welfare provisions as being part of the new property, or health care as being part of the new property. And much literature has been written on this point in the United States. So that I think the provinces, quite rightly, those who oppose the inclusion, may have been on to something in the sense that they quite rightly should be concerned that if you include property, more of their time will be taken up defending against constitutional challenges than it will at the federal level.

MR. HORSMAN: Well, this is another property-related issue that comes in a question. "Andrew, land claims in B.C. sit around 40 to 50 percent of the entire province. How will you deal with my mom's house in Prince George which is paid for and yet is right in the middle of a claim?" So that's a property issue.

MR. BEAR ROBE: Well, I'm glad that that question came up. The land claims disputes between Canada and the provinces and Indian First Nations don't deal with third party interests. It is primarily an argument between the Indian First Nation interests vis-a-vis the interests of the Federal

Crown or the Provincial Crown, so therefore, any compensation that has to be paid to Indian First Nations pursuant to land claims, whether they be comprehensive or specific, they would have to be borne by the Crown involved, whether it be the Federal or Provincial. And that would, I would say, not affect or jeopardize existing third party interests on those lands being claimed, with the proviso that in some cases, for instance, illegal expropriations of reserve lands, that might become an issue.

But in terms of general comprehensive land claims such as the Nishkas, and in British Columbia where they're not covered by any existing Treaty to relinquish Indian title, generally speaking, third party interests are sufficiently protected between the parties that are contesting the legality of land taken over by the Crown, whether it be the Federal or Provincial.

So therefore your mom's home in the middle of an Indian land claim will be sufficiently taken care of to protect your mom's interest on that home, and the costs would have to be borne by either the Federal or Provincial Crown.

MR. HORSMAN: Dr. Elton, I don't want to leave you out of this round of questions. We have some for you. "If Senate Reform in the shape of Triple E does not or cannot come to be, is one alternative the abolishment of party discipline within the Senate, and if so, will it work?" That's a good question, they needed some discipline, in my opinion, in the last little while, but I shouldn't be interjecting. Self-restraint would have been the better word.

DR. ELTON: The assumption of that question is that we perpetuate the appointed Senate; is that correct?

MR. HORSMAN: Yes.

DR. ELTON: Well, in that case, I'm an abolitionist from the word go. I don't think we should worry for one moment because really at the base of the idea of a Triple E Senate is Step Number 1, the abolition of the existing Senate. And in the event that we can't obtain, for whatever reason, the Triple E Senate, the Senate should not exist as it currently is structured. It performs too little useful function. That's the nicest thing I could say.

MR. HORSMAN: The next discussion on Senate Reform, is there also now the need to reform the House of Commons itself?

DR. ELTON: Well, that's the point that I tried to make earlier is in reforming the Senate, you, in essence, are reforming the House of Commons; because once a Triple E Senate exists, the Members in the House of Commons will of necessity behave differently. And party discipline will not disappear. I'm not even arguing that it won't exist within a new Senate. I'm simply saying that it won't have the stranglehold on people's decision-making that it currently has.

MR. HORSMAN: "I fully agree with your points and overall approach, however, I think a unanimous constitutional general amending formula would be a disaster for both Canada and Alberta. Is there an alternative way of creating provincial equality in the amending process, given that Quebec and Ontario will not likely surrender their current quasi-veto power? Indeed, Quebec has been offered full veto power in '71, '82 and formula."

DR. ELTON: Yes, the existing formula, one could certainly, even in terms of the kind of public participation I'm talking about, operationalize the existing formula so that ratification would take place in seven provinces with the majority in seven provinces containing 50 percent of the population of the country, rather than going to the Australia option, for example. That's one step this side of the Australian option, and it would work. And I think it would be much better, for example, in terms of including people in that final step to ensure that the responsibility for success or failure does not lie with the 11 First Ministers or the 11 Legislatures. Because I think there's a problem in that with regards to the way in which people are now insisting that those who are in those positions be held accountable for their actions. I think it's to the interests of the elected officials to turn around and do it in that manner.

MR. HORSMAN: "Canada is a diverse society. Andrew Bear Robe has illustrated the aboriginal aspect of rights. Western Canada is recognized as a unit in the diversity of Canada. We have multiculturalism. We have the Quebec diversity. Can a new Constitution properly preserve and honour our

diversity versus the division created by Meech Lake and the over-emphasis on the French diversity? For example, Bill C-72 entrenched the B and B, bilingualism and biculturalism, and that is detrimental to the unilingual Anglophone Westerners in the civil service, Military, the R.C.M.P., et cetera."

So who would like to tackle that one then? Can we preserve our diversity in a new Constitution? David?

DR. ELTON: Can I start on that because we've had a number of people use the phrase "English Canada" today, and I don't think such an entity ever has existed. If we're going to be precise in our language, tell me, what is "English Canada"? I don't think "English Canada" exists. There is the rest of Canada, if one wants to talk about Quebec as being an entity. Then there is the rest of us. But there isn't an "English Canada" per se that I know of any place. So in saying that, I'm really addressing the diversity of Canada and the recognition of the diverse nature of the rest of the population, and that includes, of course, very important communities within the Province of Quebec that are not Francophone, and that precision was used here.

Canada is really a country that is seeking to maintain the distinct identity of a large group of individuals that have something in common, but also have something on which they differ from one another, whether it is linguistic, whether it is cultural, whether it is ethnic. There's a wide range of things, and it's very difficult to do. I don't know of any other country that has tried to grapple with it like we have, and there's no easy answers to it. It's a question in the final analysis of having enough sense of Canadianism, enough sense of unity among the parts, that we individually choose to remain distinct from one another in and of ourselves, not because government says we should do it, not because there's a government program to support it, but because we think it's important for us and our family in the community in which we live.

But when we try and impose constitutional requirements for the maintenance of a multi-cultural society when we can't even define, quite often, the differences between the various cultures, we're into a real jackpot.

MR. HORSMAN: This is a very interesting question raised here. "I hear a lot about constitutional reform and all the good things that should be

done. I hear nothing regarding the participation of aboriginal peoples in the Constitution reform process. I think this would be a very important matter that has been overlooked by our leaders of this country. There should be a place at the table for the First Nations of this country and not be excluded in the constitutional talks and the process."

That's more of a statement than a question, but I think every government recognizes that aboriginal peoples are going to have to be included in the process, and what will really be the question is whether or not their participation will be limited to only those issues which impact upon the aboriginal peoples themselves or whether they have a larger role to play. So we'll be certainly interested in hearing people's views on that issue as we move through this process.

Andrew, perhaps you'd like to comment.

MR. BEAR ROBE: There is a provision in the Charter of Section 35.1 whereby the Prime Minister of Canada can convene the provincial governments before any amendment is made to Section 91.24 and to Section 25 of the Constitution. Now, within that Section 35.1, it states under Section B that the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

I believe there is a need for a constitutional amendment on Section 35.1 whereby instead of the representatives of the aboriginal peoples being merely invited to participate, I think instead they should be the prime participants with the Prime Minister of Canada when it comes to dealing with Section 91.24 issues, Section 25 and 35 issues, primary participants and the provincial First Ministers become the observers at this table of discussion. So it has to be switched around.

As we have all witnessed the four First Ministers' Conferences dealing with aboriginal and Treaty rights. Well, within that forum, the aboriginal leaders were given a subrole, if I could call it that, to the First Ministers. Now, we're talking about aboriginal and Treaty rights. The aboriginal leaders, representing all the national aboriginal organizations, should have as much weight and voice as the First Ministers around that table. That's all I have to say on that matter.

MR. HORSMAN: Well, thank you. I have four items here which

have a number of questions included on them, but I don't have the name and address. I'd like if the person who wrote these four pages could give us their name and address, we'll try and respond. I don't think it would be possible for us to do this morning. But they relate to the issue of self-government and the Criminal Code, its implications on and off the reserve. The land claims issue which I mentioned about the house in Prince George. Aboriginal Nations submitting members of the Senate. The equation used to reflect rep. by pop. The budget of Canada. How to enforce and balance the budget. Interestingly enough the questioner says, "This question is for humorous reasons only".

But I think it's a serious question. Language rights. A very detailed question. I think a written response is going to have to be required there.

"And is the Constitution going to enforce bilingualism in Alberta Courts? Why must individual groups be defined", et cetera.

So I don't know who wrote those, but I'd like to try to respond to those, so if you could come forward and give us your name and address, we will try and respond to those.

Now, we just have a few minutes left. The balance of the questions I have here that I think can be responded to simply relate to the whole nature of the process we're involved in here, and I'd like to try and deal with these.

"Would you please define what a Constitution is and what its function is? I rarely meet anyone who has the faintest idea. We must know what we are trying to reform. I say a Constitution is limitation on government, not on private individuals. It's not a charter for government power but a charter of the citizens' protection against the government."

And then a somewhat similar question from another party. It's a fairly lengthy one, but I think really I'm going to try and answer it this way.

When the Constitution of Canada was formed in 1867, it was done by colonial peoples seeking to obtain independence from an imperial power. And the people were not consulted directly except through their elected representatives in the colonial legislatures. That was over 100 years ago. Things have changed very dramatically since then, and as the Constitution of Canada has changed dramatically in that time. There seems to

be a perception, I think, that the Constitution, the BNA Act was fixed in time in 1867 and was never amended or changed in the interval between then and Meech Lake or the '81 - '82 process. That is just not true.

But the whole process by which it was done did not involve broad public participation. It was, in fact, through the British Parliamentary system operating in the Federal Parliament and in the Legislatures of Canada deemed to be the appropriate way of proceeding. And in that process, there are some what I would call "undemocratic" things instituted in the Constitution of Canada.

The Senate itself is undemocratic. To some extent, there is concern, as a result of the introduction of the Charter, that the appointed courts are undemocratic in nature. So what do Albertans, what do Canadians want?

I think it's inherent in this question. I think what they want is a feeling that they, citizens, are responsible for the rules that govern them. In other words, the delegation of power comes from the people to governments and not the other way around. I think that's the jist of this question. And I think, quite frankly, that's what we are trying to seek and find out in the process of this particular review and what we are going through in Canada today.

And so the Constitution, simply put, as I see it, are the bylaws by which a group of people agree to organize themselves and to elect a people who will represent their interests. But, in turn, the people still have the power to change the people that they've elected to represent them. The Constitution in the Canadian context is more difficult than in other countries because we are a federal state, and therefore requires a clear division of the responsibilities between the component parts of the federation. But what we are seeking now in this process is to find what the views of the average citizens are relative to what the Constitution should be.

Now, this process then. A number of questions have been submitted about the nature of it. Comments have been made about this being too partisan.

"Is this not a mistake? Can the task force be broadened? Is it too late?"

"This exercise in public participatory democracy is most appropriate for a major factor that severely affects the public, its

Constitution. Why hearings now, not in the three years prior to June 1990?"

That type of question and then others here are fundamental as well.

"Is any serious consideration being given by the Government of Alberta to the possibility of reducing regional tensions, not by an increased transfer of powers to provincial governments, but rather by considerable restructuring of the federal political institutions, for example, by replacing the current election system by one of proportional representation? Or are we tied to tinkering on the margin of the Westminster model?"

"What process of ultimate approval of any Constitution or Constitutional amendment is favored by the Government of Alberta? If Constitutions are ultimately and effectively to reflect the sovereignty of the people rather than being a gift of governments to the people, should not popular involvement in both the generation and the approval of constitutional amendments be both greater and more direct than it has been in the past under the government-dominated process of executive federalism. How is this affected by the composition and the initial position of the task force?"

"Does the Government of Alberta see Constitutional issues as being largely issues between governments rather than as being issues primarily of the relations between government as such and the people of the country as such? If the latter is the case, is the Government of Alberta willing to put its own character, power, and design on the negotiating table as subject to Constitutional change, or will it restrict Constitutional discussions largely to questions of the distribution of powers, resources, jurisdictions between levels of government?"

Now, those are sort of fundamental questions about where we're going now within Canada. I guess really this three and a half hours we've spent together this morning has been, from my perspective, very instructive and helpful. I hope it has from yours, because it has, I think, underlined and demonstrated that there is no simple and easy answer. It's a complex country that we live in. It's vast and diverse in many, many respects, both in terms of geography, its people, its background, and its history. Unfortunately, some of its history has not been taught properly and has been forgotten in the last few decades, it seems to me.

But in any event, so has the communication

process changed and changed dramatically. For those who followed the debates leading up to the Confederation Act of 1867, they may have done so weeks after the event occurred by reading lengthy and detailed reports of the proceedings through newspapers. That's not how the public forms its opinions today, and you know that. I don't know how many people will take the 74 pages of last week's transcript and read through it in its entirety. But I know that the impression that will be left will be determined out of a 30-second film clip on television as to what this meeting was all about today or what the meeting was all about last week. And the information overload that all of us are subjected to is tremendous. That makes it very difficult to get the public input, to get the public participation that we are truly seeking.

One question about this exercise is appropriate: "Why now and not in the three years prior to June 1990?"

Jack Ady touched on that. After Meech Lake was agreed to, the ratification in our Legislature followed this process. We introduced the resolution in June, allowed it to stand over until November, and asked for public input in the interval. In my own case, in my constituency and the two MLAs adjacent to me, we advertised public meetings to discuss Meech Lake in three different locations. And I forget exactly how many people turned out to those three public meetings in which three MLAs attended and spent three different evenings, but it was less than 20.

I attended and spoke to a number of meetings here in Calgary to discuss Meech Lake, and the attendance was not bad, but it sure wasn't great. Jack tried in his own constituency to get public input into the process, and all of us did in one way or another.

The New Democratic Party actually took a group of their MLAs and went across the province and held public meetings to seek input, and when we got back into the Legislature in November, it was debated and eventualy passed unanimously by our assembly, but there was not a great deal of interest. And that's part of the problem of communication that we have to face.

So we tried back in '87 to involve the public in the process. There wasn't interest in it until Mr. Bourassa invoked a notwithstanding clause. I mean really great public interest. There was interest by groups, special interest groups, et cetera, but great public interest did not come about until that event took place in December 1988, and from then on, it

was very, very difficult for those of us who had, in fact, passed Meech Lake through our Legislatures. And there we were, as a Legislature, having unanimously passed our support for Meech Lake, going on to further discussions. That's the way it worked.

Well, we're going through a different process now. We are not trying to be partisan in this process, and we will take our findings of the views of Albertans, as we see them to be, to a full discussion within our Legislature and, hopefully, in that process with the discussion with the people of Alberta, and that's what it's all about.

And we're serious about it, and we're working hard at it, and the fact that you've all come out this morning and sat through three and a half hours with us on this process. We've had some excellent presentations on key issues affecting the future of this country. While all of us may not have agreed on everything that was said, we are listening and listening carefully.

And yet, the Federal Government came out yesterday with a process of their own that's different than ours, and I must say I was somewhat apprehensive about that Shakespearean quotation being thrown in about "killing all the lawyers", and I'm sure others around the table feel the same way. That's always made me uncomfortable, that Shakespearean quote. I've heard it, I might tell you, as a lawyer, about a million times in my life, but it always made me apprehensive.

And also the comments that were made that politicians should be excluded from the process. Well, how can that possibly be? I mean, you folks have elected us to represent you. So we've go to be part of the process. That doesn't mean we have to tell you, and we will not tell you what's good for you. You have to tell us what you want. But eventually, a process will have to be established whereby elected people vote on and establish positions on behalf of Albertans in this process.

And perhaps a system can be devised to put this to a referendum in Canada. That's been inherent in some of the representations, but that's an interesting challenge in itself. How do you word a question on a referendum?

The Swiss have done it incrementally, we're told, small bits at a time. Maybe that's the way it has to be done. The Australians have done it by referendum through other processes, and maybe small bits at a

time there as well. But what we're facing here is not going to be a small bit at a time, it seems to me. It's going to be a very major overhaul of the Canadian Constitution if we're going to make it work for the people.

But we are going to continue this process, and we'll be prepared to revise it as we go along.

One of the things that I found a little bit disturbing in some of the questions I was asked by the news media this morning were, "Well, now that the Federal Government is in there with their process, don't you think you might as well abandon yours?" Well, folks, the answer to that is, No, it's not. We're not going to leave it solely up to the Federal Government. David, you made this point. And we are not going to leave it up to the Province of Quebec and their process to set the constitutional agenda for Alberta and for Western Canada, but we can only speak for Albertans.

We are going to be there, and we are going to have a constitutional position when the time comes to discuss it in detail again with the Canadian people. So that's what we are embarking on. It may be imperfect, but I've never met anybody yet who's perfect. I'm not, for sure, and I don't think anybody else out there in this group is perfect either. But we will, I think, in the spirit of goodwill, work our way through this process so that Albertans' views are clearly understood and that we reflect them when we take them to the ultimate opportunity we will have to revise and reform, and I underline that word, Canada's Constitution.

Thank you all very much for being here today, and listen to it all on television again if you're really bears for punishment.

Thank you.

(Proceedings adjourned at 12:45 p.m.)